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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD SADLOWSKI, *et al.*,
Plaintiffs-Petitioners

v.

F. RAY MARSHALL, Secretary of Labor,
Defendant-Respondent

and

UNITED STEELWORKERS OF AMERICA,
Intervenor-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Edward Sadlowski, et al., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The 2-Judge panel of the Court of Appeals did not hear oral argument or write an opinion; its summary Order of affirmance appears as Appendix A. The Order of the Court of Appeals of January 24, 1980 denying rehearing

appears as Appendix B. The Order of the Court of Appeals the same day denying the suggestion for rehearing *en banc* appears as Appendix C. The opinion of the District Court is reported at 464 F. Supp. 858 (1979) and appears as Appendix D.

JURISDICTION

The judgment of the Court of Appeals denying rehearing (Appendix B) was entered on January 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor failed to carry out his duty to make a full, reasonable and proper investigation of the violation-ridden election of top United Steelworkers officers on February 8, 1977; whether the Secretary failed to carry out his duty as lawyer for the complainants challenging that election; and whether his Statement of Reasons for not seeking to upset that election was arbitrary and capricious on its face.

STATUTE INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 482 (LMRDA), provides in pertinent part:

> (a) A member of a labor organization * * * may file a complaint with the Secretary within one calendar month [after he has exhausted his intraunion remedies] alleging the violation of any provision of section 481 of this title * * *.
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary * * *.

STATEMENT

This is a suit by plaintiff Edward Sadlowski and the other four members of his election slate against defendant Secretary of Labor to require the Secretary's compliance with and implementation of Title IV of LMDRA in connection with the United Steelworkers' violation-ridden election of top USWA officers on February 8, 1977. Plaintiffs contend that the Secretary failed to make a full, reasonable, and proper investigation of the election violations as required by Title IV of LMRDA, failed to carry out his duty to act as lawyer for plaintiffs, and provided a Statement of Reasons for not seeking to upset the election that was arbitrary and capricious on its face. The District Court granted motions for summary judgment by the Secretary and intervenor USWA without answering any of plaintiffs' contentions, in effect holding that a Statement of Reasons 83 pages long was all that LMRDA required (App. D at 9a, 13a, 16a). A 2-member panel of the Court of Appeals summarily affirmed without oral argument and without giving any reason whatever for the affirmance and the Court thereafter denied rehearing *en banc* or otherwise (App. A, B, C). The Court below, in unexplained and inexplicable silence, has thus nullified both LMRDA's election provisions intended to insure union democracy and this Court's rulings in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972)* and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) implementing those provisions.

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* Like the instant case, *Trbovich* was a petition from an affirmance without opinion.

1. *Background: The Only Hope For Enforcement of the Union Democracy Provisions of LMRDA Lies With The Courts*

"To challenge an entrenched union president . . . [has] long been considered one of the more daring if not foolhardly exercises in union politics." [1] To challenge the entrenched bureaucracy of the Steelworkers Union is the ultimate in such daring and foolhardiness. For the USWA is run by its Official Family (J.A. 3)[2] and, indeed, I. W. Abel, the Union's President at the time of the disputed February 8, 1977 election, testified that the Union's Official Family, consisting of the International Officers and the District Directors, automatically "support each other" against any challenger with financial, legal and other assistance. *Brennan* v. *United Steelworkers of America and Edward Sadlowski*, Civil Action No. 73-0957-B (W.D.Pa.), deposition August 15, 1974, at 6, 7, 11, 12, 13, 15, 16. Mr. Abel also testified that a union member who challenged an incumbent and lost should not appeal to the government under LMRDA "even though there was ballot-box stuffing" (*id.* at 37-38). The Official Family is thus, on the basis of the Union President's own sworn testimony, a private government operating outside the law of the land (J.A. 3).

Mr. Abel's predecessor as President of the USWA and as head of its Official Family, David McDonald, went even farther. Mr. McDonald related his role in personally stealing union elections and, referring to the probability of theft in this very election, stated "that unless Sadlowski would have an overwhelming victory in the United States he will not win the presidency. The Canadian return sheets will carry enough votes in favor of Lloyd McBride [the Official Family candidate] that he will be declared elected" (J.A. 4).

[1] J. Herling, RIGHT TO CHALLENGE 301 (1972).

[2] "J.A." references are to the Joint Appendix in the Court below.

Recent USWA history confirms Mr. McDonald's statements on stolen elections. For example, the 1973 election for Director of District 31 (USWA's largest district), which resulted in the purported defeat of the reform challenger, Edward Sadlowski, was so corrupt that, after a Federal District Court ordered a new election under Labor Department supervision, Sadlowski won by a two-to-one margin over the Official Family candidate (J.A. 4). The overwhelming victory by the reform group in the rerun supervised election indicates how many votes had to be stolen in the first election in order to count out plaintiff Sadlowski.[3]

Added to the Official Family's control of the USWA is the fact that the Labor Department, far from assisting reform challengers in the interest of fair elections and union democracy, has become an obstacle course for those seeking to challenge union incumbents:

> "The struggle by UMWA [Mineworkers] members to overturn tyranny in their Union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them, by the

[3] Determined that there never again be a serious Sadlowski-type challenge to the Official Family as in the 1973 election for the District Director described in the text and the 1977 election for President involved in this case, the Official Family brought suit to prevent foundations from contributing to making a USWA election as fair as possible (*McBride* v. *Rockefeller Family Fund*, No. 79-1177, October Term, 1979) and induced the Internal Revenue Service to attack the tax exemption of the Association for Union Democracy, the only organization working full-time for union democracy. But likely the most blatant Official Family assault on union democracy occurred at the September, 1978, USWA convention. There the USWA Constitution was amended to forbid outsiders (non-members) from contributing to, or supporting as lawyer or otherwise, a candidate for International office. Staff contributions to incumbents, on the one hand, and no outsider support for reform challengers on the other, is patent incumbent *self-perpetuation*. Sadlowski and others have brought suit to have this USWA provision declared unconstitutional. *Sadlowski* v. *United Steelworkers*, C.A. No. 79-2953 (D.D.C.).

officials within the United States Department of Labor, purportedly the guardians of union members' rights under LMRDA. Too often, union reformers have found the Department of Labor allied with union incumbents against their interests." Brief for United Mine Workers of America as amicus curiae, p. 3, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

"[O]ver the past 12 years under four administrations the Labor Department has generally been timid and reluctant to give Landrum-Griffin [the popular name for LMRDA] the vigorous implementation and strict enforcement that Congress expected." Former Senator Robert B. Griffin, United Mine Workers' Election, 1971, Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (1971), pt. 2, p. 42.

"The Department's procedures place far greater reliance on the internal union appeals process than on litigation and emphasize promotion of the DOL's conception of the public interest rather than enforcement of individual rights." Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407, 474 (1972).

"[W]e note that this case [Trusteeships] has consumed more than seven years while three Secretaries of Labor have successively manned the helm . . . the districts involved have endured trusteeships for decades. The case at bar suffers by comparison with other litigation brought by union members to liquidate trusteeships which was concluded successfully in far less time." *Hodgson* v. *United Mine Workers of America*, 473 F. 2d 118, 130 (D.C. Cir. 1972).

". . . the Secretary and the Department have daily dealings with labor on a wide range of issues, only a very small percentage having to do with elections. If the Secretary is to work amicably with the unions on the range of issues, capitulation on title IV enforcement may seem a natural response. All the

systematic and continuous pressure on the Secretary is one-sided, coming from incumbent union officials who have little interest in vigorous title IV enforcement. And the political pressure is at its highest during insurgent election challenges. *This pressure amounts to capture by organized labor of the agency meant to regulate it.*" James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 Harv.Civ.Rights—Civ. Liberties L.Rev. 247, 295 (1978). (Emphasis supplied).

Added to these twin obstacles facing a reform challenger in the USWA—Official Family autocracy and Labor Department indifference or worse—is the especially cozy relationship between the Department and the USWA lawyers.[4] This relationship is well illustrated, for example, by the Department's actions *in this Court* in the case where Sadlowski sought fees for his success in obtaining a supervised re-election in District 31. *United Steelworkers* v. *Sadlowski*, No. 77-643, October Term, 1977. The United States Court of Appeals for the D.C. Circuit (*Usery* v. *Local Union No. 639*, 177 U.S.App.D.C. 222, 543 F.2d 369 (1976)) and the Third Circuit had both held that an intervenor in a successful suit to upset a union election may be awarded attorneys' fees. While USWA's petition for certiorari to review the Third Circuit decision was under consideration by this Court, Solicitor of Labor Clauss reversed the Labor Department's previously neutral position on this issue and wrote USWA counsel Gottesman a letter (unbeknownst to the Solicitor General) supporting the union's position against attorneys' fees which letter was filed with this Court by the USWA counsel. At the time the Clauss letter was originally sent to Gottesman (it was later edited by Gottesman to make it more presentable to this Court and redispatched by Clauss to Gottesman under the

[4] As this Court said in *Hall* v. *Cole*, 412 U.S. 1, 13 (1973), union lawyers are at the "beck and call" of those in charge of the union.

original date), Gottesman was a member of the judicial screening committee considering Clauss' application for a District Judgeship and supported her application. After these facts were made known to the Attorney General by representatives of the Bar Association, Clauss was forced to ask that her nomination to the Bench be withdrawn. Although both Solicitor Clauss and attorney Gottesman have successfully resisted being deposed on these matters, the facts are of record in the Sadlowski fee case on remand. *United Steelworkers of America* v. *Sadlowski*, Civil Action No. 73-957 (W.D.Pa.). This matter becomes doubly relevant because Solicitor Clauss was one of the two Labor Department officials who made the decision not to bring suit herein (J.A. 146) and Mr. Gottesman was the USWA attorney urging that result.[5]

This is the *factual* background against which this case comes to this Court. But there is also the *legislative* background of the Congressional intent in enacting LMRDA. As this Court made clear, Congress was extremely concerned about the danger that union leaders were abusing the powers conferred on them and "saw the principle of union democracy as one of the most important safeguards against such abuse, and accordingly included in the LMRDA a comprehensive scheme for the regulation of union elections." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 531 (1972). That comprehensive scheme for the regulation of union elections is in danger of nullification by the unions and the Labor Department; only this Court stands in the way of that nullification process.

2. *Proceedings Below*

The complaint lists two kinds of violations of LMRDA —pre-election violations and election-day violations. The

[5] Gottesman's request to Clauss for her help in this Court on the Sadlowski fee case goes back at least to November 9, 1977. Clauss' decision not to sue is dated November 11, 1977.

former included massive violations in obtaining nominations for the Official Family slate to create a bandwagon effect (J.A. 6-8);[6] 800 USWA staff representatives campaigning on union time for the Official Family slate (J.A. 8); forced financing of the Official Family's campaign by these staff representatives and other USWA employees (J.A. 9); denial of Sadlowski observers (J.A. 11-13); violence against Sadlowski supporters (J.A. 13-14); use of union dues to prepare and mail expensive publications to the members (J.A. 10, 59-60); use of USWA in-house and retained counsel, paid from membership dues, to defend the Official Family slate's interests in conflict with the membership's interests (J.A. 10); and, possibly saddest of all, the use of the great name and reputation of A. Philip Randolph in support of McBride's campaign without Mr. Randolph's knowledge or consent (J.A. 37). These blatant violations of law foreshadowed the equally widespread violations on election day: McBride supporters stuffing ballot boxes; fraudulently reporting more votes than there were union members; fraudulently filing incredible returns in which each member of the Sadlowski slate was given identical votes, as was each member of the McBride slate; fraudulently filing equally incredible returns in which zero or near zero votes for the Sadlowski slate were reported; fraudulently filing returns prior to the completion of voting and counting; failing to provide a secret ballot; campaigning for the McBride slate within the polling area; harassing and obstructing Sadlowski slate observers; preventing, delaying and frustrating elections where favorable results of Sadlowski were anticipated; failing to give proper notice of the election; failing to insure that all eligible voters and only eligible voters could cast a ballot; reporting

[6] One staff representative summed it up this way: "I am under instruction to get the nominations [for the Official Family slate] no matter what I have to do to get them" (J.A. 39).

McBride victories when in fact no elections were held (J.A. 17).

Plaintiffs' complaint contains three counts: (I) that the Secretary failed to make a full, reasonable and proper investigation of the election violations as required by Title IV of LMRDA (J.A. 23-42); (II) that the Secretary failed to carry out his duty as lawyer for the complaining union members (J.A. 43-50); and (III) that the Secretary provided a Statement of Reasons for not seeking to upset the election that was arbitrary and capricious on its face (J.A. 51-61).

Relying upon the Secretary's Statement of Reasons the Secretary of Labor and intervenor USWA filed motions for summary judgment. The District Court granted these motions on February 8, 1979 (App. D). In response to plaintiffs' contention that the investigation was not full, reasonable and proper, the District Court in effect held that it had to take the Secretary's word in his Statement of Reasons that he had made an appropriate investigation (App. D at 12a). In response to plaintiffs' contention that the Secretary had failed in his duty to act as plaintiffs' lawyer, the District Court responded that there was no such duty until *after* the Secretary had instituted suit (App. D at 16a). Finally, to plaintiffs' argument that the Secretary's Statement of Reasons was arbitrary and capricious on its face, the District Court in effect held that anything 83 pages long could not be arbitrary and capricious (App. D at 9a, 13a, 16a); the Court refused even to acknowledge the many individual instances of arbitrariness set forth by plaintiffs (App. D at 4a-18a).

A 2-Judge panel of the Court below affirmed without oral argument or giving any reason for its action. A petition for rehearing and a suggestion for rehearing *en banc* were both denied.

REASONS FOR GRANTING THE WRIT

This Court's rulings in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) ended—or at least were thought to have ended—the Secretary of Labor's arrogation to himself of absolute authority to enforce or not to enforce the union democracy provisions of LMRDA. The judgment of the Court below regresses to the pre-*Trbovich-Bachowski* era and leaves the Secretary wholly free to act or not to act as he in his unlimited discretion deems appropriate.

1. Section 402 of LMRDA requires that, where a member of a labor organization has filed with the Secretary of Labor a proper and timely complaint against the union election, "the Secretary *shall* investigate such complaint." The Secretary wholly failed to carry out the explicit duty thus imposed to make a full, reasonable and proper investigation of the challenged election. One example, the farcical investigation of the Canadian locals (J.A. 23-31), will give the Court the flavor of what went on in the so-called investigation. That investigation was conducted by one Tremblay, *a man in the pay of the Steelworkers* (J.A. 27-28). Tremblay started the proceedings by failing to notify the Sadlowski group that he was investigating the election and holding hearings (J.A. 27). For an investigation of 850 locals in Canada, Tremblay had only one staff assistant; he interviewed only one USWA staff representative and no office employees; he reviewed no local union publication for campaign material; he denied the Sadlowski group summaries of the hearings he held without them and the names of the witnesses who testified there; he refused to hear the proffered testimony of any Sadlowski slate witnesses; his report contained dozens of serious and significant misstatements, misrepresentations, omissions and distortions (J.A. 28-29).

It is impossible to determine even today what the Secretary's position is on this Canadian investigation. The

Statement of Reasons uses studied ambiguity—"Nothing in Mr. Tremblay's Report affects those conclusions" (J.A. 145)[7]—which can mean either he did or he did not rely on the Tremblay investigation. Then the Department changed its position; a month later, on December 12, 1977, the Solicitor of Labor wrote plaintiffs' attorneys that ". . . it must be clear to you that we did not rely on the Canadian report in reaching the decision to close the case" (J.A. 30).[8] In the District Court the Department of Labor returned to its studied ambiguity, threw doubt on its December 12, 1977 letter and appeared to be placing some unspecified degree of reliance on that investigation. In the Court below, instead of making clear once and for all whether the Secretary was or was not relying on the Canadian investigation, the Government compounded the ambiguity of its earlier positions by coming up with the new, meaningless and self-evident proposition that "the report of the Canadian Government . . . did not affect the conclusions of the Department of Labor with respect to the United States portion of the investigation" (Brief 7, 37).[9]

[7] The District Court simply parroted this excerpt from the Statement of Reasons (App. D at 8a) without ever referring to the Department's constantly changing position which had been called to his attention. The Court below, of course, said nothing on this score, or on any other matter.

[8] Notably, Solicitor Clauss wrote this letter at the time she was negotiating with USWA lawyer Gottesman for a letter on the Sadlowski fee case and was about to apply for the judicial post to the panel on which Gottesman sat.

[9] The Government's contention below that the Secretary had no alternative to whatever it was he did or didn't do with the Canadian report (Brief 23-26) is without substance. Once plaintiffs informed the Secretary of Tremblay's conflict of interest (J.A. 27-28), the Secretary could have asked the Canadian Government for a new investigator instead of rejecting with hostility plaintiffs' information concerning Tremblay's conflict of interest. Equally, the Secretary could have adopted a suggestion by plaintiffs, as well as one of the Secretary's investigators, that plaintiffs' witnesses be brought to this country to give evidence which the Union would then have been

One can understand the Government's dilemma in not wanting to answer the question plaintiffs have so long been propounding: Did the Secretary rely on the Canadian investigation or did he not? If he *did* so rely, his decision was predicated on an unlawful investigation by a man in the pay of the Steelworkers carried out under conditions described above. If he *did not* so rely, then the Secretary made no investigation whatever of a substantial part of the election and his action is equally unlawful.[10]

The District Court refused to review the adequacy of the investigation, Canadian or American (App. D at 12a). The 2-Judge affirming panel of this Court gave no reason for its affirmance. If this case is allowed to stand as is, the Secretary's statement that he made an investigation is all that is required to thwart the congressional purpose to insure fair democratic elections.

forced to rebut (J.A. 27). The Government's contention (p. 25) that inferences from the failure of the Union to answer plaintiffs would have been of no use in a suit brought by the Secretary to overturn an election is again without substance. If plaintiffs' witnesses produced a *prima facie* case of massive Canadian election violations, these witnesses could have been put on the stand in court to make the same *prima facie* case which, if unrebutted, would support a judgment for the Secretary.

[10] The United States investigation was hardly much better. The Department investigated for less than six weeks, covered only 16% of the United States locals (J.A. 31) and stopped investigating by the first week of August, 1977 (the decision was not made till November 11, 1977). Since the Secretary's limited investigation reduced the Official Family margin in Sadlowski's case by roughly 40% and in plaintiff Montgomery's case by over 90% (J.A. 24, 33) the Secretary had a duty to go forward with questionnaires (as proposed by Sadlowski) or by investigation of additional local unions. The Government gave no reason whatever why it sat on its hands and did no investigating for *more than 90 days* waiting for the Tremblay report when further United States investigation could clearly have produced an opposite result. The Department's failure to go ahead with questionnaires or investigation of additional local unions during this more than 90-day waiting period constituted an arbitrary and capricious refusal to make a full, reasonable and proper investigation.

2. LMRDA imposed upon the Secretary of Labor the duty to act as the union members' lawyer in efforts to overturn a union election. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1972); *Dunlop* v. *Bachowski*, 421 U.S. 560, 570 (1975). Plaintiffs' complaint makes clear that the Department wholly rejected that duty in word and deed (J.A. 43-50). The Department explicitly refused to act in the role imposed by Congress and recognized by this Court. On August 15, 1977, at a meeting to discuss the conduct of the investigation, the following exchange between Sadlowski attorney Rauh and Carl Rolnick, Director of the Department's Labor-Management Standards Enforcement, occurred (J.A. 43):

> "Rauh: Do you think you are acting as lawyer for Sadlowski?
>
> Rolnick: Absolutely not. *It is not my position to act as lawyer for Sadlowski.*"

Further, the Secretary even refused to meet with Sadlowski representatives (J.A. 44), refused to make timely responses to their letters and protests (J.A. 45-47), refused to inform them of the Department's investigative plans or consult or accept assistance thereon, and refused to keep the Sadlowski slate informed about the Department's investigation while they were simultaneously keeping the McBride slate fully aware of its progress (J.A. 48-50). It was particularly damaging to plaintiffs' rights to have the Labor Department consulting with the lawyers for the Official Family and giving them the opportunity to explain away the adverse evidence resulting from the investigation, while at the same time refusing to give the plaintiffs the opportunity to buttress and supplement that evidence and rebut the USWA representations. The Secretary turned his duty to act as the complainants' lawyer on its head.

The Secretary's purported justification for refusing to act as the complaining parties' lawyer is that the plaintiffs cannot "instruct" the Secretary to file suit. Of course not. But this does not derogate from the Secretary's duty, as plaintiffs' lawyer, to give plaintiffs a reasonable degree of cooperation and assistance up to the point of decision on whether to bring suit.

The District Court's conclusion (App. D at 16a)—"only after the Secretary has instituted suit does he . . . become an advocate for the complaining union member"—is equally fallacious. For that, of course, is the exact point where the union member does not need the Secretary because he can intervene in the case himself. *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972). Furthermore, this time factor is nowhere suggested in this Court's statements on the subject in either *Trbovich* or *Bachowski* and is directly contrary to the statement of the bill's sponsor, Senator John Kennedy—on which this Court relied—that the Secretary of Labor "in effect becomes the union member's lawyer" upon his "appeal to the Secretary . . ." (Legis. Hist. of the LMRDA 1093).[11]

In the Court below the Secretary sought to shrug off this Court's imposition of the duty to act as the union members' lawyer as "a convenient metaphor" (Brief 32). Nothing could more clearly evidence the Department's

[11] This Court also apparently assumed that the Secretary became the complainants' lawyer upon receiving their complaint. In *Bachowski*, the Court reasoned as follows: "Since the Secretary's role as lawyer for the complaining union member does not include the duty to indulge a client's usual prerogative to direct his lawyer to file suit, we may reasonably infer that Congress intended that the Secretary supply the member with a reasoned statement why he determined not to proceed" (421 U.S. at 572). There is a clear presupposition in this language that the Secretary has already become the union member's lawyer by the time he has made his determination not to sue. Since the Court is saying that it is the Secretary's duty as the member's lawyer to give him a Statement of Reasons for not instituting suit, it simply does not make sense to say he is *not* the lawyer *until* he institutes suit.

lack of concern for the enforcement of LMRDA as documented in the Statement (*supra*, pp. 5 to 8). The Secretary's duty to act as complainants' lawyer, propounded both by LMRDA's Congressional sponsor and by this Court, has been unilaterally nullified by the Secretary and will remain unimplemented unless this Court acts.

3. The Secretary's Statement of Reasons for refusing to bring suit to upset the election was arbitrary and capricious *on its face*.[12] Eight examples were particularly relied upon by plaintiffs in the Courts below.

(i) Any Statement of Reasons that fails to make clear whether the Secretary *is* or *is not* relying upon the so-called Canadian investigation, as the present Statement fails to do, is obviously arbitrary and capricious. For, if the Secretary is conceding that there was no proper investigation in Canada upon which he could rely, he has no basis for denying that violations in Canada may have affected the outcome of the election. On the other hand, if the Secretary did rely on the so-called investigation in Canada in his Statement of Reasons, he is knowingly relying upon an investigator in the pay of the Steelworkers and an investigation unworthy of the name. *Deliberate ambiguity* on so vital a point is the height of arbitrariness and capriciousness.

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[12] In *Bachowski*, this Court went beyond arbitrariness on the face of the Statement of Reasons and authorized a trial-type hearing on the Department's actions "where the Secretary's decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act.'" (at 574). It seems clear that the Secretary's failure to make an adequate investigation, his refusal even to cooperate with the Sadlowski slate for whom Congress expected the Secretary to act as lawyer and the improper relationship between Steelworkers' attorney Gottesman and the Solicitor of Labor (one of the deciding officials here) are "clearly defiant" of the purposes of the Act. Since the Statement of Reasons is also clearly arbitrary on its face, a decision on this latter point may not be necessary.

(ii) Concluding that violations could not have affected the outcome of the election on the basis of the McBride results rather than the results in the Montgomery contest (Montgomery, of course, is a plaintiff herein) is not only arbitrary and capricious, but evidences the Secretary's *adversary* stance towards those to whom his duty is to act as lawyer. If the analysis had been based on the Montgomery election, where even the Department's inadequate investigation eliminated *over* 90% of the margin, any additional investigation or the acceptance of plaintiffs' position on any of a score of contentions on the effect of violations would have required an opposite conclusion. The Secretary gave no explanation for this action.

(iii) When violations in 16% of the locals in the United States reduced the McBride margin over Sadlowski by roughly 40% and Montgomery's by over 90% —a rate of violation that applied to the totality of United States locals would result in an overwhelming victory for the Sadlowski slate—it was arbitrary and capricious for the Secretary to rule that United States violations could not have affected the outcome of the election. The Secretary never explained why he made no further investigation in the United States during the 3-month waiting period for the Canadian "investigation" or refused to extrapolate from the violations found.

(iv) The Secretary's Statement of Reasons refuses to follow established judicial precedent in computing the effect of violations on the outcome. For example (J.A. 52), although the Secretary concedes that, when members are denied the right to vote, all their votes must be credited to the victim of the violation, in his Statement of Reasons he arbitrarily refused to credit the victims with all affected votes when the violation is lack of secrecy, fraud, or other inadequate safeguards of the balloting. In the latter instance of lack of secrecy, fraud

or inadequate safeguards of balloting, the Secretary arbitrarily throws out all the votes of the local instead of crediting them to the victim of the violations. The Secretary continues this arbitrary distinction in his Statement of Reasons although it flies in the face of an authoritative judicial decision on this point (*Bachowski* v. *Brennan*, 413 F.Supp. 147 (W.D. Pa. 1976)). There, on remand from this Court, District Judge Dumbauld expressly ruled that LMRDA's secrecy provisions were for the benefit of the challengers (at 150) and the Statement of Reasons was "so irrational as to be arbitrary and capricious" where the Secretary threw out all votes in instances of lack of secrecy and safeguards instead of crediting them to the challenger (at 151).[13]

(v) The Secretary's reasoning that USWA's willful obstruction to the recruitment of Sadlowski observers could not have affected the outcome of the election is a classic Catch 22 situation (J.A. 58, 185). The Secretary argues that the denial of observers is immaterial "if the investigation disclosed that the election was otherwise properly conducted" (*id.*). But how does the Secretary know that the election was otherwise properly conducted when he investigated only a minuscule sample of those locals without Sadlowski observers and found violations in a substantial number of them? The circular thread of the Secretary's reasoning has unsurprisingly produced a fabric of arbitrary and capricious conclusions.[14]

[13] The Court below apparently accepted the Secretary's position on remand in *Bachowski* that secrecy defaults were "merely technical violations" (App. D at 15a). All authority is to the contrary. *Marshall* v. *Steelworkers, Local 12447*, 100 L.R.R.M. 2383 (3d Cir. 1978); *Hodgson* v. *United Mineworkers of America*, 344 F.Supp. 17, 30 (D.D.C. 1972); see *Brennan* v. *Local 3489, United Steelworkers*, 520 F.2d 516 (7th Cir. 1975), *aff'd*, 429 U.S. 305 (1977). The Secretary's position in those cases is wholly at odds with his position here or on remand in *Bachowski*.

[14] The Secretary's reasoning is not only circular, but erroneous. As Chief District Judge Bryant ruled in the *Mineworkers* case, "The failure and refusal of the UMWA to assume any responsibility for providing sufficient information to Yablonski for him to avail himself of the opportunity to cover the polls with observers constitutes a flagrant violation of the Act," which alone "may have affected the outcome of the election." *Hodgson* v. *United Mineworkers of America*, 344 F. Supp. at 27, 31.

(vi) The Secretary found there was violence against Sadlowski supporters by staff representatives and union officials and that this "concerted effort to try to intimidate and abuse those who supported Sadlowski" was widely publicized (J.A. 57-58, 186). Incredibly, he contends that this violence by McBride supporters confirmed by his own inadequate investigation could not have had any effect on the outcome of the election.[15] Running against entrenched incumbents is a lonesome and almost hopeless job at best; fear of violence by incumbents makes it impossible. Yet all the Secretary does is blink—one could hardly find anything more arbitrary and capricious.

(vii) The Secretary likewise blinked at the extensive illegal USWA staff activity on behalf of the McBride slate (J.A. 8-9). The Statement of Reasons concedes plaintiffs' basic charge concerning the campaigning of staff representatives (J.A. 55-56, 157). It states at one point that the "investigation disclosed that staff representatives campaigned actively, and that most of them supported the McBride slate"; and, at another point, in defending AFL-CIO President George Meany's January 15th attack on the Sadlowski campaign, concedes that "the Staff Representatives were well informed about the candidates and were active in the campaign long before Janu-

[15] Here, too, the Secretary's reasoning should be compared with Judge Bryant's decision in the UMWA case holding that even a non-violent discharge from office "served notice of what might be expected on all officers, employees, and members of the defendant union who might have been Yablonski supporters," holding it "the type of violation which very well may have affected the outcome of the election," *Hodgson* v. *United Mineworkers of America*, 344 F.Supp. at 28.

ary 15, 1977" (J.A. 55, 179). Despite these findings, the Secretary argues that, because "distinctions between union time and personal time are difficult to make" and "Staff Representatives for the most part have no set hours," the Secretary cannot find that staff campaigning "may have affected the outcome" of the election (J.A. 55, 157).[16] In effect, the Statement of Reasons arbitrarily and capriciously reads staff violations out of LMRDA and dooms its enforcement in the common case of incumbent domination and use of staff.

(viii) Despite all the violations found by the Secretary in his inadequate investigation—including violations potentially tainting numbers of votes which cannot be precisely ascertained—nowhere in his Statement of Reasons does the Secretary refer to the shift to the USWA of the burden of proof to demonstrate that these violations could not have affected the outcome of the election. This not only evidences once again the Department's lack of concern for the enforcement of LMRDA, but equally evidences its casual attitude towards this Court's decisions.

If a violation of Section 401 of LMRDA is established, it must be presumed that the violation "may have affected" the outcome of an election, unless it is met by "tangible evidence" demonstrating that the violation did not affect the result. *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 506-07 (1968).

[16] The Court may want to compare the Secretary's enforcement of LMRDA with the enforcement of 2 U.S.C. 441(b) which makes it unlawful for a union to make any expenditure (including providing services) in connection with a federal election. One can picture the Federal Elections Commission and the Attorney General laughing when a union came in and said that their staff representatives' work for a particular federal candidate should not be considered a violation of section 441(b) because "staff representatives for the most part have no set hours." But that is exactly what the Labor Department said here.

After noting that Congress had deliberately lightened the burden of demonstrating the effect of violations, this Court held:

> "the congressional purpose in changing 'affected' to 'may have affected' in order to avoid rendering the proposed 'remedy practically worthless,' [is satisfied] by ascribing to a proved violation of § 401 the effect of establishing a prima facie case that the violation 'may have affected' the outcome."

In support, the Court cited "the reasoning of" *Wirtz* v. *Local Union 410, IUOE*, 366 F.2d 438, 443 (2d Cir. 1966), regarding circumstances where "proof relating to effect on outcome must necessarily be speculative"; and went on to hold that the District Court had incorrectly concluded that the evidence in rebuttal met the case, because the considerations it relied on were merely "conjecture," not "tangible evidence against the reasonable possibility" that the violations affected the outcome (391 U.S. at 508-09).

The District Court simply refused to review plaintiffs' complaints of arbitrariness.[17] The Court apparently decided that 83 pages of anything could not be arbitrary and capricious (App. D 9a, 13a, 16a) and refused to respond to plaintiffs' arguments. The Court below, of course, affirmed without oral argument or opinion despite the fact that this dereliction by the District Court was repeatedly pointed out to it. If this case is allowed to stand as is, judicial review of the Statement of Reasons becomes a mockery.

4. The unexplained order of the Court below flies in the face of this Court's ruling in *Bachowski*. For years

[17] As indicated in the text, plaintiffs set forth 8 examples of arbitrariness in the Secretary's Statement of Reasons. Seven of these specific examples (i, ii, iii, v, vi, vii, viii), the District Court did not mention at all in his opinion. With respect to the single example he mentioned at all (iv), the Court simply repeated the Secretary's explanation (App. D at 14a-15a). The Court below, of course, mentioned none of the 8.

the Labor Department had contended that its decision not to bring suit to upset an election was so much a matter of its own internal discretion that it did not even have to inform the challenging group of its reasons for not suing and that the courts had no authority to review the Secretary's actions no matter how arbitrary or capricious or otherwise unlawful. This Court in *Bachowski* rejected the Secretary's thesis that he had unlimited discretion to act in any way he wished and confirmed the power of judicial review to require the Secretary to further LMRDA's purpose of insuring fair elections in the interest of union democracy.

The 2-Judge panel order means that the Secretary is free to make whatever investigation he sees fit, no matter how inadequate. The 2-Judge panel order means that the Secretary's duty to act as the complaining members' lawyer can be turned upside down into hostile treatment of the complaining members. The 2-Judge panel order means the end of scrutiny of the Secretary's Statement of Reasons. The union democracy movement might as well have lost *Bachowski* as to have the Court below silently nullify it.

5. Congress has endowed labor unions with extraordinary authority. It has made unions the exclusive representative of the employees for whom they bargain whether the employee desires such representation or not. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332 (1944). It has authorized unions to enter into collective bargaining agreements under which employees must pay dues to the union whether the employee desires to make such payments or not. *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734 (1963). Having granted such government-like authority to labor unions, Congress had the obligation to provide that the officers of those labor unions be fairly elected (cf. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944)) and it was precisely that that the Congress sought to do in Title IV of LMRDA.

In 1959 Congress set up a wholly new procedure in LMRDA to make certain that the election of the union officers who would exercise this extraordinary authority would be fair. It took away the right of the individual complainant to sue to upset an unfair election and in place of that right made the Secretary the lawyer for the complaining party. Far from carrying out this Congressional intent, the Department of Labor has for two decades evidenced a very real disdain for the enforcement of LMRDA (see pp. 5 to 8, *supra*), as this Court itself well knows from the Secretary's unsuccessful submissions here in *Trbovich* and *Bachowski*. After all this, for the courts to look the other way now when the Secretary makes an inadequate investigation, treats the complaining party with hostility instead of acting as his lawyer, and fails to give adequate reasons for refusing to sue is to construe the statute in a way that raises serious issues of due process and turns the Congressional intent for fair elections on its head. The Labor Department having failed to act, as intended by Congress, in the interest of fair elections in unions given government-like powers, this Court has the duty to act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action 78-0250

[Filed Nov. 30, 1979]

No. 79-1461

EDWARD SADLOWSKI, *et al.*,
Appellants,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*

Before: WRIGHT*, *Chief Judge*, TAMM and WILKEY, *Circuit Judges*

ORDER

On consideration of appellee's (United Steelworkers of America) motion for summary affirmance and of the responses filed with respect thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the order of the District Court on appeal herein be, and the same hereby is, affirmed.

Per Curiam

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* Chief Judge Wright did not participate in this order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action 78-0250

[Filed Jan. 24, 1980]

No. 79-1461

EDWARD SADLOWSKI, *et al.*,
Appellants,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*

Before: TAMM and WILKEY, *Circuit Judges*

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 78-0250

No. 79-1461

EDWARD SADLOWSKI, *et al.*,
Appellants,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*

Before: WRIGHT, *Chief Judge*, MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD and MIKVA, *Circuit Judges*

ORDER

Appellants' suggestion for rehearing en banc has been circulated to the full Court and no judge in regular active service has requested a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court, en banc that appellants' aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Mikva did not participate in the foregoing order.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0250

[Filed Feb. 8, 1979]

EDWARD SADLOWSKI, *et al.*,
Plaintiffs,

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*,
Defendant.

MEMORANDUM

This is a complaint for declaratory and injunctive relief brought by plaintiffs, unsuccessful candidates in the February 8, 1977 election for International Officers of the United Steelworkers of America ("USWA"), against the Secretary of Labor for his alleged failure to make a full and complete investigation of the election. The complaint also alleges that the Secretary failed to carry out his duty as lawyer for the complaining union members and that his statement of reasons for not bringing suit demonstrates that the refusal to bring suit to overturn the election was arbitrary and capricious. For the reasons set forth below, the Court concludes that plaintiffs' claims are without merit and grants defendant's and defendant-intervenor's motions for summary judgment.

BACKGROUND

The USWA is the second largest union in the United States with approximately 1.4 million members. It is divided into 25 districts, 22 in the United States and 3 in

Canada, each headed by a District Director who is an International Officer. There are approximately 4,125 local unions, of which 827 are in Canada. The union holds quadrennial elections for International Officers. The actual election is conducted by the local unions acting as agents for the International. The election that is the subject of this lawsuit took place on February 8, 1977.

I. W. Abel, the incumbent International President, had announced that he would retire and would not be a candidate in the 1977 election. An officially endorsed slate of candidates for the five International Offices was announced at the August, 1976 USWA Convention. This slate was headed by Lloyd McBride as candidate for International President.

On September 13, 1976, plaintiff Edward Sadlowski, who served as District Director for the largest USWA district, announced his candidacy for International President. The other members of his slate, all plaintiffs in this action, were Ignacio (NASH) Rodriguez for International Secretary, Andy Kmec for International Treasurer, Marvin Weinstock for Vice President for Administration, and Oliver Montgomery for Vice President for Human Affairs.

In the fall of 1976, the International Union and plaintiff Sadlowski requested the Department of Labor ("DOL") to supervise the International election. This request was refused because Title IV of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA")[1] specifically provides for departmental supervision of a labor organization election only after an election has taken place and a departmental investigation based upon a member's complaint has established that violations of the LMRDA occurred during the election which may have affected the outcome. The Depart-

[1] 29 U.S.C. §§ 481-483 (1976).

ment, however, did agree to provide technical assistance with the conduct of the election.[2]

The election resulted in a victory for McBride, who defeated Sadlowski by 328,861 votes to 249,281, a margin of 79,580 votes. All other members of the McBride slate also were elected, but the victory margin was less for some officers than in the race for International President.[3] On February 18, 1977, Sadlowski filed a timely protest regarding the election with the International Tellers under article V, section 18 of the USWA Constitution. One week later he filed an additional protest, challenging various election procedures and omissions in the tabulation of votes.

The report of the International Tellers, dated April 28, 1977, acknowledged that a timely complaint had been filed and stated that in accord with the USWA Constitution, hearings would be conducted in twenty-five cities in the United States and Canada to hear protests involving election challenges in 367 locals. Sadlowski requested that his attorney be permitted to participate in these hearings, but this request was denied by the International Tellers on the ground that only USWA members could appear and participate in the hearings. After the hearings were held, the Tellers issued a report, denying Sadlowski's protests. The Sadlowski slate appealed this

[2] The assistance included the formation of a task force to issue opinions and answer inquiries about the election, the assignment of compliance officers to each United States district to instruct local union tellers regarding standards of conduct for the election and to advise during the voting process, and the assignment of DOL personnel to total the results of local union election return sheets after they were received by the International Tellers. Statement of Reasons, Exh. 2 to Defendant's Answer to Complaint, at 1-1A [hereinafter cited as Statement of Reason].

[3] The closest race was that for International Vice President for Human Affairs, which was won by the McBride candidate by 52,176 votes. Statement of Reasons, at 3 n.1.

decision to the International Executive Board, which denied their appeal. McBride and his slate were installed in office on June 1, 1977.

Having exhausted internal union remedies, the members of the Sadlowski slate filed a complaint pursuant to section 402(a) of the LMRDA[4] with the DOL, alleging violations of the Act in the conduct of the election. This statute authorizes the Secretary of Labor to conduct an investigation and if this investigation discloses probable cause to believe that there have been violations that may have affected the outcome, the Secretary is authorized to institute suit against the Union to set aside the election and secure a new election conducted under the Secretary's supervision. 29 U.S.C. § 482(b). The LMRDA requires that suits by the Secretary to overturn the results of an election must be initiated no later than sixty days from the filing of a complaint. *Id.* Because of the scope of the complaint, the Secretary obtained a series of waivers from the USWA which extended the deadline for filing suit from August 16, 1977 to November 11, 1977.

Upon receipt of the Sadlowski complaint, the DOL initiated an investigation of the election. Two hundred and fifty investigators, including many who were specially detailed to this project from their normal assignments in other areas, were given special training and made available to work on the complaint. Each compliance officer was expected to work six days a week, ten hours a day. A special post office box was leased and all reports were mailed directly to the Washington office, which was open seven days a week.[5]

The allegations made by Sadlowski in his complaint with respect to the nomination process preceding the election were not investigated because *no timely protests*

[4] 29 U.S.C. § 482(a).

[5] Statement of Reasons, at 5A.

regarding the nomination process were made and the Secretary consequently was precluded from making them the basis of a complaint.[6] The investigation encompassed each of the 301 United States locals named in the complaint as well as an additional 411 local unions investigated on the initiative of the DOL.[7] These locals were selected for investigation on the basis of factors indicating some reason for suspicion, such as lack of election returns, lopsided results, or information gathered in the technical assistance program. Interviews were conducted with 5,422 witnesses.[8]

The complaint also alleged that election violations occurred in the Canadian local unions and districts. The DOL has no authority to investigate in Canada, but the Canadian Minister of Labor convened an industrial board of inquiry to investigate allegations regarding the conduct of the election in Canada. Mr. Roland Tremblay, a former provincial judge and president of the Arbitrators Conference in Quebec and of the Economic Arbitrators of Canada, was appointed to head the inquiry. On October 25, 1977, Commissioner Tremblay issued an Industrial Inquiry Commission Report and forwarded a copy to the DOL. In his statement of reasons the Secretary concluded that nothing in the Canadian report affected the conclusions reached by the United States investigation.

In order to assess the cumulative impact of the violations disclosed by this election, the Secretary utilized the following system for quantifying, in terms of votes po-

[6] *See Hodgson* v. *Local 6799, United Steelworkers of America*, 403 U.S. 333, 336 (1971).

[7] Statement of Reasons, at 6. The 712 locals investigated represented 351,000 members, or approximately 25% of the membership of the International Union. They accounted for approximately 30% of the votes cast in the United States. *Id.*

[8] *Id.*

tentially affected, the significance of each violation found. When members' valid votes had not been tallied, their votes were credited as cast. When members were denied the right to vote, their votes were credited to Sadlowski on the theory that, if given the opportunity, they might have voted for him. When a violation such as inadequate safeguards or lack of secrecy cast doubt upon the validity of the election as a whole, all votes cast were regarded as void. When a violation such as expenditure of union funds or campaigning in the polling place tended to influence voters in favor of one candidate, all votes cast for that candidate that were subject to the improper influence were deducted from his total. When ineligible voters voted or eligible members voted more than once, their votes were deducted from McBride's total. When the violations were such that all votes cast were considered void and the local in addition failed to file an election return, the violations were deemed to have offsetting effects and no changes were made in vote totals.

On November 11, 1977, the Secretary set forth the results of the investigation. He found that there had been no widespread fraud or irregularities as alleged in the United States and that "on the whole, the election was conducted in accordance with the law and with the Union's constitution."[9] The Secretary also concluded that the isolated violations uncovered by the investigation were such as could be expected in any large election and that the violations could not have affected the outcome of the election in the United States.[10] As a result, the Secretary announced his decision not to sue to overturn the election and accompanied his announcement with an 83-page Statement of Reasons explaining the basis for his decision.

[9] *Id.*

[10] *Id.* at 7.

On February 14, 1978, plaintiffs instituted this lawsuit, seeking to compel the Secretary to bring suit to overturn the election. The USWA was granted leave to intervene as a party defendant on July 28, 1978. Presently before the Court are defendant's and defendant-intervenor's motions[11] for summary judgment.

MERITS

The LMRDA regulates various aspects of labor-management relations and internal union affairs in an attempt to assure that "labor organizations . . . and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations . . . ." 29 U.S.C. § 401(a). The special function of Title IV of the Act is to ensure free and democratic union elections and the statute sets out an exclusive enforcement scheme to redress election abuses. *Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463, 470 (1968); *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

The LMRDA precludes any private action by disappointed office seekers or other union members to contest the results of an election. Section 402 of Title IV sets up an exclusive method for protecting rights under the Act by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election. 29 U.S.C. § 482(a). The Secretary is required to investigate and if he finds probable cause to believe that Title IV has been violated, he may file suit against the union in the appropriate district court to set aside the election and secure a new election conducted under his supervision. *Id.* § 482(b).

[11] Defendant-intervenor also has moved for summary judgment on the ground that the present action was not timely filed or, alternatively, that it is barred by laches. Plaintiffs waited ninety-five days after receiving the Secretary's Statement of Reasons to bring suit, and the USWA asserts that this delay is contrary to the statutory goal of expediting post-election challenges. A recent decision of the United States District Court for the Northern District of Illinois held that a plaintiff was guilty of laches in failing to file suit to challenge the Secretary's statement for two and one-half years. *Larkin* v. *United States Dept. of Labor*, No. 78 C 2362 (Jan. 22, 1979 N.D. Ill.). Because of the Court's disposition of the merits of this action, it does not express an opinion on the question of timeliness.

The LMRDA does not expressly authorize or prohibit judicial review of the Secretary's decision not to bring suit challenging a union election. The Supreme Court, however, has held that limited judicial review of the Secretary's decision is available under the Administrative Procedure Act.[12] *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). The Court defined the permissible scope of review in the following manner:

> Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious. Thus, review may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election. The full trappings of adversary trial-type hearings would be defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unnecessary interference with their elections."

Id. at 572-73.

[12] *See* 5 U.S.C. §§ 701 *et seq.* (1976).

The Supreme Court in *Bachowski* proceeded to identify some of the "rare cases" that might justify review beyond the confines of the reasons statement. It stated that such review would be proper "if the Secretary were to declare that he could no longer enforce Title IV, or otherwise completely abrogate his enforcement responsibilities . . . [or] if the Secretary prosecuted complaints in a constitutionally discriminatory manner." *Id.* at 574. Other such cases might arise when the Secretary's decision was "plainly beyond the bounds of the Act [or] clearly defiant of the Act." *Id.* (quoting *DeVito* v. *Shultz*, 72 L.R.R.M. 2682, 2682 (D.D.C. 1969).

No court subsequent to *Bachowski* has held that the Secretary's decision not to sue was "plainly beyond the bounds of the Act [or] clearly defiant of the Act." Plaintiffs here argue that the Secretary's alleged failure to make a full, reasonable, and proper investigation of the election is an appropriate subject for expanded judicial review. The Court concludes, however, that the present facts do not represent one of the "rare cases" contemplated by the Supreme Court in *Bachowski*. Consequently, the Court limits its review to the statement of reasons provided in support of the Secretary's decision not to sue.

When a district court determines that the statement of reasons adequately demonstrates that the Secretary's decision not to sue is not contrary to law, the complaining union member's suit fails and should be dismissed. *See Howard* v. *Hodgson*, 490 F.2d 1194, 1196 (8th Cir. 1974). If, however, the reviewing court finds that the statement of reasons is "so irrational as to constitute the decision arbitrary and capricious," it must remand the decision to the Secretary for a supplemental statement of reasons. 421 U.S. at 574-75. The Supreme Court in *Bachowski* expressly reserved the question whether a court can compel the Secretary to bring suit to overturn

an election, the relief sought here, if the supplemental statement of reasons remains unsatisfactory. *Id.* It intimated, however, that this course might present "some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary." *Id.* (footnote omitted).

The argument for narrow judicial review is supported by the problems posed by a district court attempting to compel the Secretary to bring suit. Such judicial coercion would conflict with the statutory scheme of the LMRDA, in which Congress relied on the "special knowledge and discretion" of the Secretary in making decisions to bring Title IV actions. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964). Compelling such a suit would raise questions regarding the principles of separation of powers, for the Constitution has vested the power to execute laws with the Executive Branch, not with the federal judiciary. Finally, it would be imprudent for courts to force the Secretary to sue when he is genuinely unwilling to do so because in such situations it is unlikely that the Secretary would pursue the lawsuit vigorously or effectively.[13]

Review of the statement of reasons is governed by the "arbitrary and capricious standard." 421 U.S. at 575. In this case the eighty-three page statement of reasons demonstrates that each of plaintiffs' allegations was carefully investigated as were other possible violations not raised by plaintiffs. The investigative findings were considered and weighed in reaching the conclusion that the violations that had occurred could not have affected the election's outcome.

Such a decision was within the Secretary's statutory discretion, for the Secretary of Labor does not have

[13] *See* Note, *Dunlop* v. *Bachowski and the Limits of Judicial Review Under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 Yale L.J. 885, 900-03 (1977).

an obligation to bring suit to set aside the results of an election whenever he finds a violation of the LMRDA and may refrain from bringing suit if he does not find probable cause to believe that the violation may have effected the outcome of the election. *Howard* v. *Hodgson*, 490 F.2d 1194, 1196 (8th Cir. 1974). This concept is embodied in the DOL regulations [14] and was recognized by the Supreme Court in *Bachowski*:

> [A]s a matter of law . . . the Secretary is not required to sue to set aside the election whenever the proofs before him suggest that the suit might be successful. There remains in him a degree of discretion to select cases and it is his subjective judgment as to the probable outcome of the litigation that must control.

421 U.S. at 572 (quoting *DeVito* v. *Shultz*, 72 L.R.R.M. 2682, 2683 (D.D.C. 1969)).

Only one reviewing court has found the Secretary's statement of reasons "so irrational as to be arbitrary and capricious" and this was the district court in *Bachowski*, in its decision on remand from the Supreme Court and the Third Circuit. *Bachowski* v. *Brennan*, 413 F. Supp. 147, 149 (W.D. Pa.), *appeal dismised*, 545 F.2d 363 (3d Cir. 1976). In calculating the effect of violations on the outcome of the election, the Secretary distinguished between cases in which the number of votes affected could be determined with certainty and those in which it could not. In the former situation the Secretary credited the challenger Bachowski with the whole vote in the voting unit, but in the latter, he eliminated the winner's margin of victory and treated the result as if both candidates had obtained an equal number of votes and the election had never taken place. *Id.* at 149-150. In so doing the Secretary noted that "substantive violations of a type which may affect how a voter votes are to be distinguished from merely technical violations of a procedural character." *Id.* at 150.

[14] 29 C.F.R. § 452.16(b) (1978) states:

> Violations of the election provisions of the Act which occurred in the conduct of elections held within the prescribed time are not grounds for setting aside an election unless they "may have affected the outcome." The Secretary, therefore, will not institute court proceedings upon the basis of a complaint alleging such violations unless he finds probable cause to believe that they "may have affected the outcome of an election."

The United States District Court for the Western District of Pennsylvania held that it was "contrary to the intent of Congress and . . . irrational" to classify as technical those violations affecting the secrecy of a ballot. *Id.* It concluded that the mere fact that the number of voters who failed to vote can be readily counted when no election was held is not rational justification for using the total electorate in that case but using the margin of victory when the right of secrecy has been infringed. *Id.* at 151. The Court ordered the Secretary to conduct a "recount," applying "equal protection" principles. *Id.*

An appeal of this decision to the Third Circuit was dismissed for want of a final order. *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976). The decision has been described as "exceptional" and as "resting on narrow and questionable legal grounds." [15] It appears to this Court that the review undertaken was contrary to the Supreme Court's admonition in *Bachowski*, for despite the Secretary's reasonable explanation of his method of computation, the Court substituted its own judgment for that of the Secretary. Thus, this Court refuses to hold that the Secretary's use of a similar method of computation in this case renders the Secretary's decision not to sue arbitrary and capricious.

An additional ground for relief alleged by plaintiffs in their complaint is that the Secretary failed to carry

[15] Note, *supra* note 13, at 899 n.55.

out his duty as lawyer for the complaining union member. Plaintiffs allege that the defendant did not meet with plaintiffs' counsel and that his representatives did not advise plaintiffs regarding the progress of the investigation or consult with them concerning its conduct.

The concept of the Secretary as the "union member's lawyer" derives from statements made by Senator John Kennedy during floor debates on the bill which was the precursor of Title IV of the LMRDA [16] and has been quoted by the Supreme Court in two decisions.[17] These two opinions define the scope of the Secretary's duty. In conducting an investigation and in deciding whether probable cause exists to institute suit, the Secretary is to serve the public interest and not the interests of any private party. Only after the Secretary has instituted suit does he assume a partisan role and become an advocate for the complaining union member. *See Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972). This stage was never reached in this case. As a result, plaintiffs cannot seek judicial relief based on the Secretary's alleged violation of a nonexistent duty.

CONCLUSION

Plaintiffs oppose defendant's and defendant-intervenor's motions for summary judgment on the ground that there are material issues of fact that preclude such a resolution. After consideration of the applicable legal precedents, however, this Court concludes that its judicial review is limited to the statement of reasons provided by the Secretary in support of his decision not to bring suit. A review of this eighty-three page document and the entire record in this case satisfies the Court that the Sec-

[16] 104 Cong. Rec. 10947 (1958).

[17] *Dunlop* v. *Bachowski*, 421 U.S. at 470; *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972).

retary's decision was not arbitrary and capricious and was within the bounds of his statutory discretion. For the reasons discussed above, the Court grants the motions for summary judgment filed by defendant and defendant-intervenor.

/s/ Oliver Gasch
Judge

Date: Feb. 8, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0250

[Filed Feb. 8, 1979]

EDWARD SADLOWSKI, *et al.*,
Plaintiffs,

v.

F. RAY MARSHALL, Secretary of Labor,
Defendant.

ORDER

Upon consideration of defendant's and defendant-intervenor's motions for summary judgment, the memoranda in support thereof, the opposition thereto, the arguments of counsel, and the entire record in this case, and for the reasons set forth in the Court's memorandum of this date, it is by the Court this 8th day of February, 1979,

ORDERED that defendant's and defendant-intervenor's motions for summary judgment be, and hereby are, granted.

/s/ Oliver Gasch
Judge

Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1540

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD SADLOWSKI, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals granting the Secretary's motion for summary affirmance (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 4a-17a) is reported at 464 F. Supp. 858.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1979, and a petition for rehearing

was denied on January 24, 1980 (Pet. App. 2a). The petition for a writ of certiorari was filed on April 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in concluding that the Secretary's statement of reasons for declining to file suit to overturn a union election demonstrated that he had fully investigated petitioners' allegations of misconduct and that his determination was not arbitrary, capricious or an abuse of discretion.

STATEMENT

Petitioners unsuccessfully competed for international level union offices in the February 1977 United Steelworkers of America election. After exhausting internal union remedies, they complained of election misconduct to the Secretary of Labor (App. 64-144),[1] who has exclusive authority to seek judicial redress in such cases under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481 *et seq.*

Based on petitioners' complaint, the Secretary initiated a massive investigation of the Steelworkers' election. Two hundred and fifty investigators were assigned to the case and 5422 witnesses were interviewed. Although the complaint alleged irregularities

[1] "App." refers to the joint appendix that was filed in the court of appeals.

in only 301 United States locals, the Secretary selected 411 additional locals for investigation.[2] Petitioners also challenged some Canadian results, but the Secretary obviously could not conduct an investigation in Canada. Consequently, the Secretary secured the assistance of the Government of Canada, which convened an industrial inquiry board to investigate those allegations.

Upon completion of the investigation, which inquired into all the issues raised in petitioners' complaint, the Secretary declined to file suit and issued an 83-page Statement of Reasons supporting his decision (App. 145-233). The Statement of Reasons set forth the Secretary's investigative findings with respect to each of petitioners' allegations, in a point-by-point format, and analyzed all violations to determine whether—and to what extent—they "may have affected the outcome of [the] election" (29 U.S.C. 482(c)). A tabulation of all possibly affected votes

[2] Prior to the election, petitioners and the Union had both requested that the Department of Labor undertake full and complete supervision of the election. The Department declined to do so because, except in the case of re-elections necessitated by past election misconduct, the Department has no authority to provide such assistance. Section 402(c) of the Act, 29 U.S.C. 482(c). However, "[t]he Department did agree to provide unprecedented technical assistance" (App. 147), which included the presence of compliance officers on election day and the assistance of Department officials in tabulating election returns. Consequently, Department personnel had substantial first-hand information which assisted them in pinpointing additional locals that warranted investigation. The investigation also focused on locals that either reported lopsided returns or failed to report returns (Pet. App. 8a).

demonstrated that the violations could not have changed the outcome of the election in the United States. The Statement also noted that the Canadian investigation, over which the Secretary had no control, had not uncovered any evidence affecting the validity of his conclusions (App. 145).[3] The Secretary concluded that there had been no widespread fraud or irregularities and that, " 'on the whole, the election was conducted in accordance with the law and with the Union's constitution' " (Pet. App. 9a).

On February 14, 1978, petitioners brought this action in the United States District Court for the District of Columbia, complaining that the Secretary had failed to conduct a proper investigation, that he had breached his statutory obligation to act as their "lawyer," and that his Statement of Reasons was arbitrary and capricious (App. 1-63). The Union intervened as a defendant. The district court granted defendants' motions for summary judgment, finding that the Secretary's Statement "demonstrates that

[3] The Canadian investigation was headed by Roland Tremblay, a former provincial judge, who is also the president of both the Economic Arbitrators of Canada and the Quebec Arbitrators Conference (Pet. App. 8a). The Canadian report (App. 268-294), which petitioners received in advance of the Secretary's Statement of Reasons (App. 145), concluded that "[t]he reasonable explanations put forth by trustworthy witnesses have satisfied the Board as to the irregularities present in the documents, and do not permit one to conclude that there was any fraud, corruption, malfeasance, or even evil intent in the conduct of the constitutional election of the United Steelworkers of America, which took place in Canada on 8 February 1977" (App. 294).

each of [petitioners'] allegations was carefully investigated as were other possible violations not raised by [petitioners]" and that "[t]he investigative findings were considered and weighed in reaching the conclusion that the violations that had occurred could not have affected the election's outcome" (Pet. App. 13a). The court rejected petitioners' contention that the Secretary had failed to act as their "lawyer" and held that the Secretary had not abused his discretion by declining to file suit (Pet. App. 16a-17a). The court of appeals summarily affirmed (Pet. App. 1a).

ARGUMENT

1. In *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-573 (1975), this Court held that the Secretary must give reasons for declining to file suit under Section 402(b) of the Act, 29 U.S.C. 482(b), but that judicial review must "be confined to examination of the 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to [be] * * * arbitrary and capricious."[4] In particular, the Court stated that "review may not extend to * * * trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election" (421 U.S. at 572-573).

[4] This Court noted in *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 574, that "review beyond the confines of the reasons statement" might be warranted in certain unusual circumstances, but the district court correctly found that no such circumstances were present here (Pet. App. 12a).

Although petitioners seek review on the ground (Pet. 16) that the Secretary's Statement of Reasons was arbitrary and capricious on its face, the thrust of their argument is that the Secretary erred by not enlarging the scope of his investigation and by not attributing greater weight to those violations that he discovered (Pet. 17-20).[5] Contrary to this Court's holding in *Bachowski*, petitioners seek to challenge the factual basis for the Secretary's decision and to have the courts substitute their judgment for that of the Secretary, despite the statute's reliance "upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect" (*Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 571). In any event, the Secretary's careful investigation, which went well beyond petitioners' allegations, speaks for itself.[6]

[5] In effect, petitioners contend that they are entitled to the expanded scope of review that this Court rejected in *Bachowski*. Petitioners correctly note that the decision below (Pet. App. 14a-15a) departs from the district court's analysis in *Bachowski* v. *Brennan*, 413 F. Supp. 147 (W.D. Pa.), appeal dismissed, 545 F.2d 363 (3d Cir. 1976), with respect to the appropriate methodology for assessing the effect of ballot secrecy violations. The contrary decision of one district court does not create a conflict that warrants this Court's review.

[6] Moreover, the Secretary does not have the burden of proving to a reviewing court that the violations did not affect the election results. Petitioners' reliance (Pet. 20-21) on *Wirtz* v. *Hotel, Motel & Club Employees Union*, 391 U.S. 492 (1968), is misplaced. In *Wirtz*, this Court held only that once the Secretary has filed suit and proved the violations, the *union* must carry the burden of showing that the violations did not affect the result (*id.* at 506-509). Significantly different considerations are relevant to a court's review of the Secretary's exercise of discretion in determining whether to sue. See *Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463, 472 (1968).

On its face, the Secretary's Statement of Reasons shows that he thoroughly investigated and considered all of petitioners' allegations before reaching his decision (Pet. App. 13a).[7] The district court correctly held that the Secretary had not abused his discretion in declining to file suit (Pet. App. 17a), and the court of appeals correctly affirmed that ruling (Pet. App. 1a). This essentially factual question does not warrant further review.

2. Petitioners' contention (Pet. 14-16) that the Secretary breached his duty to act as their "lawyer" —by failing to keep them fully apprised of the progress of his investigation—is likewise without merit. This Court has repeatedly emphasized that the Secretary has broad discretion in this area (*Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 482-483 (1968); *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964)), and it is clear that Congress did not intend to have the Secretary's discretion encumbered by requiring him to act as a partisan during the investigatory stage.[8] The Secretary must exercise in-

[7] Petitioners' criticism (Pet. 11-12) of the Canadian investigation is inapposite. The Secretary could not control the conduct of that investigation, and he received no information that affected the validity of the conclusions that his own investigation had reached (App. 145).

[8] Indeed, the Secretary's duty to be impartial during the investigatory stage is clear from the fact that union members may intervene once a lawsuit is filed, but only with

dependent judgment during the investigation and, as the district court correctly held, "[o]nly after the Secretary has [found probable cause and] instituted suit does he assume a partisan role and become an advocate for the complaining union member" (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

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respect to those claims that the Secretary has judged to be meritorious, because "Congress intended to insulate the union from any complaint that did not appear meritorious to * * * the Secretary" (*Trbovich* v. *United Mine Workers*, 404 U.S. 528, 537 (1972)).

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IN THE

Supreme Court of the United States

October Term, 1979

EDWARD SADLOWSKI, *et al.*,
Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

Respondent United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), opposes the petition of Edward Sadlowski, et al., for a writ of certiorari.

This case involves nothing more than application of a clear rule of law, established by this Court in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), to simple and undisputed facts. The complaint in this case sought to have the district court overturn a decision of the Secretary of Labor not to sue to upset the results of a union election. In *Bachowski*, this Court ruled that where such relief is sought the congressional purposes underlying Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter "LMRDA") require that the scope of judicial review be strictly limited (421 U.S. at 572-573):

> Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.

In the district court, USWA (intervenor-defendant) and the Secretary of Labor (defendant), relying upon *Bachowski*, moved for summary judgment based upon the Statement of Reasons the Secretary had issued in conjunction with his decision not to sue to challenge the results of USWA's election. Plaintiffs, petitioners here, offered *no* evidence of any kind, but simply contended that the Statement of Reasons was not a sufficient basis for summary judgment. Applying *Bachowski*, the district court ruled "that its judicial review is limited to the statement of reasons provided by the Secretary in support of his decision not to bring suit." Pet. App. 16a.[1] And, the court concluded: "A review of this eighty-three page document and the entire record in this case satisfies the court that the Secretary's decision was not arbitrary and capricious and was within the bounds of his statutory discretion." Pet. App. 16a-17a.

Accordingly, the district court granted the motions for summary judgment filed by USWA and the Secretary. The court of appeals summarily affirmed that decision. Pet. App. 1a. Rehearing was denied, and in response to plaintiff's suggestion of rehearing *en banc* in the court of appeals "no judge in regular active service requested a vote thereon." Pet. App. 3a.

Nothing about this case warrants this Court's plenary consideration.

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[1] Citations to the appendix attached to the petition for a writ of certiorari are in the form "Pet. App."

Counter-Statement of Facts

Plaintiffs seek to obscure the issue here by raising a thick smoke-screen of extra-record allegations and innuendo. Thus, they have filled their petition with an unrelenting attack on the character of USWA—as well as, to a lesser extent, on the character of officials and employees of the Department of Labor and an Industrial Commissioner appointed by the Canadian Minister of Labor. That attack is not predicated upon any evidence that plaintiffs or any other party deemed fit to put before the district court as a basis for its decision; rather, plaintiffs recite allegations and innuendo from their own complaint—and a few assertions put forth for the first time on appeal—which they did not attempt to establish by declaration, affidavit or in any other fashion in opposing the motions for summary judgment, the granting of which they now challenge.[2]

---

[2] Rule 56(e), Federal Rules of Civil Procedure, provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

By submitting literally nothing to support their accusations, plaintiffs thus failed totally to establish that there were any genuine issues of fact. While plaintiffs' extra-record allegations and innuendo are irrelevant to disposition of this petition, we ask the Court's indulgence that we may note the following:

First, USWA and the Secretary filed answers responding in detail to such of plaintiffs' accusations as appeared in plaintiffs' complaint. And, of course, to the extent plaintiffs' allegations of misconduct by USWA were presented to the Secretary, the results of the Secretary's investigation are contained in the Statement of Reasons.

Second, if the true "background" (Pet. at 4) of this case were relevant here, it is not that offered by plaintiffs but rather that

Remarkably, plaintiffs never address in their petition the evidence that is in the record and upon which the courts

reflected by the following: USWA is one of the few international unions which chooses its top officers by referendum election—most other unions opting for the selection of officers at delegate conventions; USWA has a long history of successful insurgent campaigns, with incumbents being defeated in elections for every level of office from International president on down; indeed, ten of the members of the present 29-member International Executive Board gained their position by defeating incumbents or administration-backed candidates. Moreover, as discussed in the Secretary's Statement of Reasons, with respect to the very election which plaintiffs now challenge—an election which plaintiffs depict as a sham perpetrated by a mythical "Official Family . . . a private government outside the law of the land" (Pet. at 4)—USWA requested "full and complete supervision of the . . . election by the Department [of Labor]," and, while the request was refused, USWA was able to obtain a significant degree of Government oversight and assistance in the conduct and monitoring of the election. Joint Appendix in the court of appeals (hereinafter "JA") at 147-149.

Third, plaintiffs give prominence to their allegation that the Solicitor of Labor and counsel for USWA engaged in improper conduct in another case at a time subsequent to the Secretary's determination and Statement of Reasons here. Pet. at 7-8, 12 n. 8. Plaintiffs chose not even to *make* this allegation in the district court in this case, let alone to introduce evidence supporting it, notwithstanding that at the very same time they *were* making the allegation in the case in which they allege the purported misconduct occurred, *Marshall* v. *United Steelworkers of America*, Civil Action No. 73-957 (W.D. Pa.). (It was in that latter case, not in this case, that "Solicitor Clauss and attorney Gottesman . . . successfully resisted being deposed" (Pet. at 8)—the magistrate in that case finding such discovery to be irrelevant to all issues then pending). There is thus not a shred of evidence in this case to support the charge of misconduct which they allege, or at least insinuate. While we resist the urge to be dragged into discussion of the merits of allegations that are extra-record and extraneous in any event, we wish to state categorically with respect to the incident in question that no impropriety occurred.

below reached their decision: the Secretary's explanation, as set forth in the Statement of Reasons, for the decision not to bring suit to upset USWA's 1977 election of its International Officers. Plaintiffs prefer to speak of the alleged "background" of the case than to discuss the case itself, see Pet. at 4-8; and plaintiffs prefer to mention the allegations of misconduct that they submitted to the Secretary than to set forth the findings of fact the Secretary made as to these allegations, see Pet. at 8-10. The contents of the Secretary's Statement comprise the sum and substance of what this case is about. The sole issue in the case is whether the district court was correct in ruling that that Statement is a sufficient basis for summary judgment. Accordingly, we briefly summarize herein the Statement's contents.

A USWA election for international officers is a massive undertaking, as the Statement describes (JA 147):

> The conduct of an international election in the United Steelworkers of America is a formidable task. The union is the second largest in the United States and has approximately 1,400,000 members. It is divided into 25 Districts, 22 in the United States and three in Canada, each headed by a District Director who is an International officer. Within the Districts, there are subdistricts and approximately 5,125 local unions with 827 of these being in Canada. The actual election is conducted by these local unions, acting as agents for the International.

Under the LMRDA, the Secretary is required to determine whether to file suit and, if appropriate, to file suit within 60 days after receiving an election challenge from a complaining union member, 29 U.S.C. § 482(b), subject only to such extensions of that period as the union being investigated may grant.[3] The task of the Secretary in the instant

[3] See, *e.g.*, *Hodgson* v. *International Printing Press & Assist. Union*, 440 F.2d 1113, 1117 (6th Cir. 1971) *cert. denied*, 404 U.S. 828 (1971); *Hodgson* v. *Local 851, Int. Ass'n of Mach. & Aerospace Workers*, 454 F.2d 545 (7th Cir. 1971).

case was to devise an investigative program which was equal to the enormity of the inquiry yet capable of being performed within the statutory time limits. The Statement describes in detail the investigation that the Department of Labor conducted with respect to the United States portion of the election, which included *inter alia* utilizing 250 investigators, who worked 60 hours per week and interviwed 5422 witnesses (JA 152-153, 154):

> Even before the receipt of Sadlowski's complaint, the Department made plans for the investigation of any complaint to the Secretary which might be filed. Arrangements were made to have two hundred and fifty compliance officers (investigators) available to work on the case, including many who were specially detailed to this project from their normal assignments in other program areas. These were given special training for the assignment. The compliance officers were divided into teams of two, with supervisors located at headquarters established in the 22 cities where the Steelworkers had District offices. Kits were prepared for each investigator, containing among other things the internal protests, a sample ballot, the International Union's Constitution and Elections Manual, and special instructions. The supervisors attended a day-long meeting devoted to discussing the plan for investigating a complaint directed to the Steelworkers election, in the Department's Washington office during the first week in June. When Sadlowski's complaint was filed on Friday, June 17, 1977 all compliance officers working on the case immediately proceeded to their assigned locations and investigation was started. Each compliance officer was expected to work six days a week, ten hours a day. A special post office box was leased and all reports were mailed directly to the Washington office which was open seven days a week.
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> The 301 United States locals named in the protest and the complaint to the Secretary were investigated. In addition an investigation was conducted of the 153 local unions which filed no election returns and an additional 225 local unions were selected for investigation. The selection of local unions for investigation was primarily based on factors which indicated some reason for suspicion, *e.g.*, lopsided results, or information gathered in the technical assistance process. As a result of leads received during the course of the investigation, 33 more locals unions were investigated, including all of the local unions in Puerto Rico because in its early stages the investigation indicated a high incidence of violations there. Interviews were conducted with 21 District Directors, 541 staff representatives, 159 clerical employees, 250 "casual" employees, 1,613 local union officers, 257 candidate observers, and 2,581 rank-and-file members. The 712 locals which were finally investigated represented 351,000 members or approximately 25 percent of the membership of the International Union, and accounted for approximately 30% of the votes cast in the United States.

The Statement emphasized that the investigation was not based on a random sample of USWA locals, but rather was designed to reach every local where there was any reason to suspect a violation (JA 233, emphasis added):

> The investigation did not extend to every local union, but was planned so as to focus on those areas in which there was *any indicated possibility of violations being disclosed.* The investigation extended to every District and Subdistrict Office, and included a thorough review of records and interviews of personnel at the national level. At the local level, the investigation began with the locals enumerated in the complaint and all locals in which the election results appeared in any way questionable. It was expanded to include all locals for which leads were developed. . . .

Based on the results of this investigation, the Secretary reached the following conclusion as to the overall conduct of the election in the United States (JA 154):

> The investigation in the United States did not disclose widespread fraud or other irregularities as alleged, nor were the findings such as to indicate a pattern of violations which could be extrapolated beyond the area of investigation. On the whole, the election was con-

ducted in accordance with the law and with the Union's Constitution.

That is not to say of course that the Secretary's investigation disclosed no violations at all. In the words of the Statement, "there were as there are in any large election numerous violations of law, disclosed by the investigation." JA 155. The Secretary's approach to these scattered violations[4] was: (1) to calculate the "potential effect" of each; (2) to aggregate the "potential effects" of all violations; and (3) to determine whether the aggregate of the "potential effects" of all violations was of sufficient size to offset the actual margins of victory in the election. The Statement explains, "[t]his calculation was required in order to make the statutory determination whether the violations in their totality 'may have affected the outcome' of the election." JA 155.

The Statement spends approximately 75 of its pages detailing, on a local-by-local, allegation-by-allegation basis, the evidence found with respect to each category of violation alleged by plaintiffs. JA 155-230. In each instance where the Secretary found a violation, the Statement sets forth the number of votes attributed to that violation as its "potential effect."

The Statement sets forth the principles by which the Secretary calculated the "potential effect" of each violation (JA 155):

> 1. When members' valid votes had not been tallied, they were credited as cast. When members were denied the right to vote, their votes were credited to Sadlowski on the assumption that, if given the opportunity, they may have voted for him.
>
> 2. When a violation cast doubt upon the validity of a local election as a whole (*e.g.*, inadequate safeguards or lack of secrecy), all votes cast were regarded as void.
>
> 3. When a violation tended to influence voters in favor of one candidate (*e.g.*, expenditure of union funds or campaigning in the polling place), all votes cast for that candidate which were subject to the improper influence were deducted from his total. When there was a combination of violations in the second category and this category, votes cast for the "non-offending" candidate were not voided.
>
> 4. When ineligible members voted, or when eligible members voted more than once, their votes were deducted from McBride's total.
>
> 5. When the violations were such that all votes cast were considered void (*e.g.*, inadequate safeguards or lack of secrecy) and in addition the local failed to file an election return the violations were deemed to have offsetting effects and no changes were made in the vote totals.

[4] For the purposes of discussion, we use the term "violation" to characterize each instance where the Secretary found "probable cause" to believe that a violation had occurred. We do not mean thereby to concede that the Secretary could have proved each such violation.

Each of the plaintiffs had been defeated by a wide margin in the election. Out of a total of approximately 560,000 votes cast in the United States and Canada, the closest race (International Vice President (Human Affairs)) was decided by 52,000 votes and the margins in the other races were higher, reaching 120,000 votes in the race for International Secretary. In the race for International President, Lloyd McBride defeated plaintiff Edward Sadlowski by a vote of 328,861 to 249,281, a margin of nearly 80,000 votes. JA 150.

The Secretary found that the aggregate of the "potential effects" of the violations found in the United States would not offset plaintiffs' margins of defeat in the United States portion of the election. Thus, the Secretary found (JA 233, emphasis added):

> McBride's margin of victory *in the United States* was

42,448. Adding the votes which have been credited to him or deducted from Sadlowski, the margin would be increased by 2,093, to 44,541. Deducting the votes which have been taken from McBride's total or credited to Sadlowski would reduce the adjusted margin by 17,263 votes, to 27,278 votes.

The Secretary concluded that (*ibid*):

> "These figures demonstrate to the satisfaction of the Department that the violations which occurred could not have affected the outcome of the election within the United States."

After reiterating that the investigation was designed to focus "on those areas in which there was any indicated possibility of violations being disclosed," the Secretary emphasized that (JA 231):

> . . . [E]ven if there were any violations in locals which were not investigated, the investigation was so thorough and was directed in such a manner that there is no reasonable cause to believe that any such violations were significant in magnitude or in effect.

The Secretary faced a special problem with respect to investigating violations alleged to have occurred in the Canadian portion of the election: LMRDA does not apply in Canada, and the Secretary is without power to conduct an investigation in that country. The Statement sets forth the Secretary's resolution of that problem (JA 154):

> The allegations in the complaint relate to the election which was conducted in the United States and it was also alleged that violations of law occurred in the Canadian local unions and districts. The Secretary of Labor has, of course, no authority to send investigators into Canada and all investigations conducted by the Department of Labor took place in the United States. In an earlier case involving another union, the Canadian Government refused the Department's request to pursue its investigation within Canada. Because of this, the Department attempted in this matter to proceed to make arrangements for an investigation in the local unions and Districts located in Canada. Arrangements were made for the appointment by the Canadian Labor Minister of an Industrial Inquiry Commissioner, Mr. Roland Tremblay, to probe the conduct of the Canadian portion of the election. Mr. Sadlowski's attorney was advised of that fact. On October 25, 1977, an Industrial Inquiry Commission Report was issued by Commissioner Tremblay and copies were sent to the Department of Labor, the International Union and the complainant.

Mr. Tremblay, the Commissioner appointed by the Canadian Ministry of Labor to lead the inquiry, is "a former provincial judge and president of the Arbitrators Conference in Quebec and of the Economic Arbitrators of Canada." JA 300.[5] The Industrial Inquiry Commission reported that its investigation did not establish "that there was any fraud, corruption, malfeasance, or even evil intent in the conduct of the constitutional election of the United Steelworkers of America, which took place in Canada on 8 February 1977." JA 294.

The Secretary concluded that Commissioner Tremblay's report "provides no basis for assuming that violations occurred of sufficient magnitude that they may have affected the outcome of the *Canadian portion of the election,*" much less that they were of sufficient magnitude to negate not only the entire Canadian margin for the McBride slate but also to cancel the substantial margins for that slate in the United States which remained even after the Secretary's deductions for tainted results (JA 231, emphasis added):

> McBride's margin in Canada was some 37,000 votes. Commissioner Tremblay's report indicates evidence in some local unions of matters that appear to be violative of the Act, but it provides no basis for assuming that violations occurred of sufficient magnitude

[5] The repeated assertion in the petition that Mr. Tremblay was "in the pay of the Steelworkers" (Pet. at 11, 12, n.9, 13, 16) is without any foundation in the record and is in any event ridiculous, as explained at note 11, *infra*.

that they may have affected the outcome of the Canadian portion of the election. The violations in Canada, when combined with violations in the United States, could have affected the outcome of the election only if they may have affected a number of votes exceeding McBride's entire Canadian margin of victory, *plus* sufficient additional votes to overcome his untainted margin of 27,000 votes in the United States.

"Thus," the Secretary concluded, "the outcome of the entire election could not have been affected by the combined violations in the United States and Canada." JA 231.

Reasons For Not Granting The Writ

This case was decided correctly by the courts below and in any event involves no issue worthy of this Court's attention. The district court, affirmed by the court of appeals, decided that this case involves nothing but the application of the *Bachowski* standard of review to the Statement of Reasons issued by the Secretary, and that the Statement easily meets that standard—*i.e.*, the Statement does not show the Secretary's decision to be arbitrary and capricious. Plaintiffs attempt in their petition to make the case appear to involve more. But their rhetoric reduces to two simple legal contentions: they contend both that they were entitled to a broader standard of review than that afforded under *Bachowski*, and that even under the *Bachowski* standard the Statement does not pass muster. We show below that neither of these contentions bears analysis.

1. *Standard of judicial review.* Plaintiffs argued in the court below, and imply in their petition here, that their suit to set aside USWA's 1977 election of officers should not be governed by the *Bachowski* standard—*i.e.*, that they are entitled to broader judicial review than a

> . . . review . . . confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.

421 U.S. at 572-573. Plaintiffs base this entitlement upon their contention that, while they seek the same *relief* as in *Bachowski*—to set aside the Secretary's decision not to sue to challenge the results of a union election—the alleged *grounds* upon which they seek that relief are different: plaintiffs challenge not only the substance of the Secretary's decision, as in *Bachowski*, but also the adequacy of the investigation leading to that decision and the Secretary's purported failure to perform as their lawyer during the investigation and decision-making process. See Pet. at 11-16. These different grounds, according to plaintiffs, remove their case from the restrictions of *Bachowski*, and accordingly entitle them to a full trial in district court, not merely to review on the face of the Statement of Reasons.[6]

Plaintiffs' argument flies directly in the face of *Bachowski*, and of this Court's understanding of the congressional intent in adopting the enforcement scheme of Title IV of LMRDA. The issues resolved in *Bachowski* were whether and to what extent there may be judicial review of a decision by the Secretary of Labor not to sue to set aside a union election. The standard of judicial review set forth in *Bachowski* was the culmination of Court's resolution of those questions, and was presumably to be applicable to any suit challenging such a decision by the Secretary. The case here is precisely such a suit: it challenges the Secretary's decision not to sue to set aside the results of USWA's 1977 election of officers and seeks to have that decision judicially reversed. JA 62. Nothing in *Bachowski* indicates that the standard of judicial review in a suit of this type should somehow be different depending on the particular grounds upon which the Secretary's decision is alleged to be inadequate,[7] and the rationale of *Bachowski* refutes any such contention.

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[6] See note 9, *infra*.

[7] See note 9, *infra*.

Title IV of LMRDA invests in the Secretary the exclusive power to sue to set aside a union election. 29 U.S.C. § 483. The Act does not expressly provide for any judicial review of a decision by the Secretary not to sue. In *Bachowski*, the Court, finding no " 'clear and convincing evidence' that Congress meant to prohibit all judicial review of the Secretary's decision," ruled that the Administrative Procedure Act authorizes a limited scope of review, 421 U.S. at 568. The Court was careful to state, however, that (421 U.S. at 568):

> although no purpose to prohibit all judicial review is shown, a congressional purpose narrowly to limit the scope of judicial review of the Secretary's decision can, and should, be inferred in order to carry out congressional objectives in enacting the LMRDA.[8]

The Court derived the precise contours of that limited scope of judicial review from its understanding of those "congressional objectives." Thus, the Court reviewed the reasons that persuaded Congress to make the Secretary's power to bring suit exclusive, precluding defeated candidates from bringing their own suits to challenge union elections (421 U.S. at 568-570):

> Congress "decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest . . . [and] decided not to permit individuals to block or delay union elections by filing federal-court suits. . . ." *Calhoun* v. *Harvey*, 379 U.S. 134, 140 (1964). Congress' concern was "to settle as quickly as practicable the cloud on the incumbents' titles to office,". . . . ". . . Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted. . . ." *Trbovich* v. *Mine Workers*, 404 U.S. 528, 532 (1972). ". . . Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary."

Given these congressional objectives, the Court concluded that judicial review must be restricted in the following two respects (421 U.S. at 571, 573):

> [1] . . . [S]ince the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit. . . .
>
> • • •
>
> [2] The full trappings of adversary trial-type hearings would be defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unnecessary interference with their elections."

In this light, the Court fashioned the appropriate scope of judicial review (421 U.S. 572-573):

> Except in what must be the rare case,[9] the court's

[8] As the Chief Justice observed in his concurring opinion, 421 U.S. at 590:

> . . . [T]he Court has fashioned an exceedingly narrow scope of review of the Secretary's determination not to bring an action on behalf of a complainant to set aside an election. The language and purposes of § 401 of the [LMRDA], 29 U.S.C. § 481, have required the Court to define a scope of review much narrower than applies under [the APA] in most other administrative areas.

[9] In footnote 12 of their petition, plaintiffs suggest that they may qualify for the "rare case" exception to the rule that judicial review should be limited to the face of the Secretary's statement of reasons. This Court described the nature of that exception (421 U.S. 574):

> The Secretary himself suggests that the rare case that might justify review beyond the confines of the reasons statement might arise, for example, 'if the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogated his enforcement responsibilities . . . [or] if

review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious. Thus, review may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election.

The *Bachowski* standard thus contemplated that resolution of challenges to decisions by the Secretary not to sue would be by summary judgment, not trial (421 U.S. 573, 574):

> If . . . the Court concludes . . . there is a rational and defensible basis [stated in the reasons statement] for [the Secretary's] determination, then that should be an end of this matter, for it is not the function of the Court to determine whether or not the case should be brought or what its outcome would be.
>
> • • •
>
> When the district court determines that the Secretary's statement of reasons adequately demonstrates that his decision not to sue is not contrary to law, the complaining union member's suit fails and should be dismissed.

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the Secretary prosecuted complaints in a constitutionally discriminatory manner. . . .' Brief for Petitioner 9 n. 3. Other cases might be imagined where the Secretary's decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act.' *DeVito II*, 72 L.R.R.M. at 2682. Since it inevitably would be a matter of grave public concern were a case to arise where the complaining member's proofs sufficed to require judicial inquiry into allegations of that kind, we may hope that such cases would be rare indeed.

Even if, *arguendo*, plaintiffs' allegations were the "kind" which the Court contemplated "inevitably would be a matter of grave public concern," those allegations alone, unsupported by affidavits, declarations or other proper proof, are not enough to defeat the motions for summary judgment made below. See Rule 56(e), Federal Rules of Civil Procedure, quoted in pertinent part at note 2, *supra*. *Bachowski* itself, as just quoted, contemplates that the "rare case" of judicial inquiry beyond the confines of the reasons statement could be occasioned only by sufficient "proofs." 421 U.S. at 574. Plaintiffs, however, have come forward only with allegations and rhetoric.

Thus, plaintiffs pick out a distinction without a difference when they point to the fact that their grounds for relief from the Secretary's decision are not the same as the grounds asserted in *Bachowski*. Plaintiffs may assert different grounds, but the relief they seek is the same: to have the Secretary's decision not to sue set aside. For example, their quest for "a full, reasonable, and proper investigation of the February 8, 1977 election" (JA 62) implicitly seeks a setting aside of the Secretary's existing decision not to sue; otherwise, it is difficult to understand what purpose such an investigation would serve. The same is true of plaintiffs' request that the Secretary be directed "to fulfill his duty to act as lawyer for members of the Sadlowski slate." JA 62. A claim which would set aside the Secretary's decision not to sue is by any other name a claim governed by the *Bachowski* standard of review. The reasons which led this Court to adopt that standard are necessarily applicable to any such claims. For example, the conduct of an election investigation was as surely committed by Congress to "the special knowledge and discretion of the Secretary" as the rest of the decision-making process; with respect to the Secretary's decisions regarding the investigation as with the rest of the process there is thus "[t]he necessity that the reviewing court refrain from substitution of its judgment for that of the Secretary." 421 U.S. at 572. And, "[t]he full trappings of adversary trial-type hearings" as to plaintiffs' investigation and lawyer claims would be just as

> defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unneces-

sary interference with their elections." (421 U.S. at 573)

The congressional concerns which prompted the *Bachowski* standard would go unsatisfied if defeated candidates could evade the restrictions of that standard simply by changing the grounds on which they would have the Secretary's decision set aside.

What we have so far established does not mean that the Secretary's conduct of the investigation is immune from judicial review. Nor does it necessarily mean that plaintiffs could not have secured a trial-type hearing had they sought to mandamus the Secretary at the time his allegedly defective investigation was in progress.[10] What it means, rather, is that in the context in which plaintiffs have presented their investigation claim—a *post-facto* effort to set aside the Secretary's decision—that claim is subject to review according to the *Bachowski* standard. The investigation the Secretary conducted is part of the basis for his ultimate decision not to sue. As with the other elements of that decision-making process, the investigation may be the ground for setting aside that decision only if, as revealed by the reasons statement, it was conducted in such a manner as to render the Secretary's decision arbitrary and capricious. Plaintiffs make several contentions regarding the investigation which are addressed to this standard; we respond to those contentions in part 2, *infra* at 19-24.

Similarly, plaintiffs' claim that the Secretary violated his "duty to act as the union members' lawyer" (Pet. at 14-16)—were there such a duty—would have to be resolved in this *post facto* suit to set aside the Secretary's decision in the manner prescribed by *Bachowski*: that is, as revealed by the Statement, did the Secretary perform his duty to

[10] We do not mean to imply that plaintiffs would have been entitled to such a hearing in a mandamus action, but only that the resolution of the issue here does not address the issue of the scope of review in a mandamus action.

function as lawyer for plaintiffs in such a manner as to render his decision arbitrary and capricious?

Even as a *Bachowski* claim, this claim would fail at the threshold. For, as the district court found, the duty to act as lawyer on which plaintiffs rely is "nonexistent." Pet. App. 16a. The Secretary's decision not to sue cannot be rendered arbitrary and capricious for failure to perform a non-existent duty.

Plaintiffs seize upon language in the legislative history of LMRDA, which is referred to in two Supreme Court cases, *Bachowski*, 421 U.S. at 570, and *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972), and seek to create from it a legal duty applicable in a context where such a duty would make no sense.

Upon receipt of a complaint from a union member, the Secretary's duty is to investigate that complaint to determine whether probable cause exists for instituting a suit against the union, and, if so, to exercise his "discretion to select cases" based on "his subjective judgment as to the probable outcome of the litigation." *Bachowski*, 421 U.S. at 572. Congress,

> in deliberately [giving] exclusive enforcement authority to the Secretary . . . emphatically asserted a vital public interest in assuring full and democratic elections that *transcends the narrower interest of the complaining union member*. . . .

421 U.S. at 569 (emphasis added). Indeed, as part of that broader interest, Congress intended the Secretary to perform his function in such a manner as "to protect unions from frivolous litigation and unnecessary judicial interference with their elections." *Id.* The Secretary was thus not meant to be partisan or single-minded at the pre-lawsuit stages of his function; he was meant to serve a variety of interests, including some adverse to the interests of the complaining union member. In this light, it would be incongruous to find that at these stages the Secretary has a

legal duty to serve as lawyer for a party with a particular interest in the outcome of the decision the Secretary is to make.

The district court put it correctly (Pet. App. 16a):

> In conducting an investigation and in deciding whether probable cause exists to institute suit, the Secretary is to serve the public interest and not the interests of any private party. Only after the Secretary has instituted suit does he assume a partisan role and become an advocate for the complaining union member. See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972). This stage was never reached in this case. As a result, plaintiffs cannot seek judicial relief based on the Secretary's alleged violation of a nonexistent duty.

2. *Application of the standard of review to the Secretary's Statement.* In their petition, plaintiffs identify eight "examples" which they say reveal that the "Secretary's Statement of Reasons . . . was arbitrary and capricious *on its face.*" Pet. at 16 (emphasis in original). We address each "example" briefly in turn, using plaintiffs' numbering system for convenience in cross-referencing:

(i) Plaintiffs' first "example" is what they term the Secretary's "deliberate ambiguity" as to whether he "*is* or *is not* relying upon the so-called Canadian investigation." Pet. at 16 (emphasis in original).[11] Plaintiffs simply ignore the Statement's explanation of the account the

[11] Plaintiffs repeatedly assert without any foundation, that the Canadian investigation "was conducted by one Tremblay, *a man in the pay of the Steelworkers*" (Pet. at 11, emphasis in original; see also Pet. at 12, n. 9, 13, 16). Mr. Roland Tremblay was appointed to head the Canadian investigation by the Canadian Minister of Labor, pursuant to an Act of the Canadian Parliament. Mr. Tremblay is a former provincial judge, and at the time of his investigation herein was President of the Arbitrators Conference in Quebec and President of the Economic Arbitrators of Canada. JA 300. Plaintiffs submitted no evidence to substantiate their allegation that Mr. Tremblay was "in the pay of the Steelworkers." He has served as an impartial arbitrator of disputes between USWA and certain employers, and so far as we can tell it is this role which plaintiffs depict with their innuendo-laden characterization.

Secretary took of the results of the Canadian investigation (JA 231):

> McBride's margin in Canada was some 37,000 votes. Commissioner Tremblay's report indicates evidence in some local unions of matters that appear to be violative of the Act, but it provides no basis for assuming that violations occurred of sufficient magnitude that they may have affected the outcome of the Canadian portion of the election. The violations in Canada, when combined with violations in the United States, could have affected the outcome of the election only if they may have affected a number of votes exceeding McBride's entire Canadian margin of victory, plus sufficient additional votes to overcome his untainted margin of 27,000 votes in the United States. Thus, the outcome of the entire election could not have been affected by the combined violations in the United States and Canada.

The explanation is both unambiguous and wholly reasonable. Without authority to investigate in Canada—where the LMRDA does not even apply—the Secretary induced the Canadian Government to conduct an investigation pursuant to the Canadian labor laws, and to have the results of that investigation reported to the Secretary. Once having received that report, the Secretary obviously was faced with the question of how to assess the results of the Canadian investigation in light of the Secretary's findings in the United States portion of the election. As explained in the above-quoted passage from the Statement, that question was easily answered in this instance by the following logic.

> —The results of the Department of Labor investigation *in the United States* showed that even after deducting the maximum number of votes theoretically affected by all violations for which the Secretary found probable cause, each of the members of the McBridge slate still would have carried the United States by a substantial margin.

—In the official tally, each of the members of the McBride slate carried Canada by a wide margin, a fact the Canadian report attributed in substantial part to two facts: (a) that a Canadian was running on the McBride slate for one of the top offices, and no Canadian was running on the Sadlowski slate for a top office; and (b) that the McBride slate actively campaigned in French Quebec (and included a French Canadian candidate for National Director of Canada), whereas the Sadlowski slate did not engage in active campaigning in French Quebec (and had no French Canadian candidate for any office).[12]

—In order, therefore, for the findings of the Canadian investigation to be of significance with respect to the validity of the overall outcome of the election, they would have had to have disclosed violations which not only (a) negated the entire Canadian margin for the McBride slate candidates, but also (b) cancelled the substantial margin in the United States for these candidates which still remained after the Secretary's deductions of potentially "tainted" votes.

—As the Secretary's Statement recites, the Canadian report provides "no basis for assuming that violations [of LMRDA] occurred of sufficient magnitude that they may have affected the outcome of the Canadian portion of the election," much less the Canadian portion *plus* the remaining margins (after deductions) in the United States.

The Secretary's conclusion from all this is eminently reasonable: "Thus, the outcome of the entire election could not have been affected by the combined violations in the United States and Canada."

(ii) Plaintiffs' second asserted "example" of the irrationality of the Statement of Reasons on its face reduces to the following: if instead of focusing on the McBride versus Sadlowski election, examination is made of the Lynch versus Montgomery contest—the closest of the elections for USWA international officers, with Lynch beating Montgomery by over 52,000 votes[13]—then, in plaintiffs' words,

> [E]ven the Department's inadequate investigation eliminated *over* 90% of the margin [in the United States], [and] any additional investigation or the acceptance of plaintiffs' position on any of a score of contentions on the effect of violations would have required an opposite conclusion."

Pet. at 17. (Emphasis in original.)

As discussed more fully in response to (iii) below, the Secretary conducted an investigation of every local in the United States where there was any basis for suspecting a violation had occurred. For every violation turned up by that investigation, the Secretary then compiled the number of votes that might theoretically have been affected by that violation. The assumptions on which that computation was made are set forth *supra* at 8-9. These assumptions are, obviously, unrealistically generous to the challenging candidates. The following examples from the body of the Statement of Reasons illustrate that generosity (JA 220, 225, emphasis added):

> The investigation disclosed other locals which gave inadequate notice of election. . . . In an International as large as this there is a constant fluctuation in the number of members and this fact was taken into consideration. On the other hand, if an identifiable and defined group did not receive notice, such as members on lay-off or at a separate location, *it has been assumed that had notice been received by those members that all would have voted and all would have voted for Sadlowski.* Where there was a failure to mail notice to a substantial number of members, *those members who did not receive notice are assumed to have been for Sadlowski.* • • •
>
> For a variety of reasons some locals failed to hold elections thus depriving the members of their right to vote. The position of the Secretary with respect to

[12] JA 281-283, 286.

[13] JA 150.

this type of violation is that all eligible voters may have been affected by the violation and *to assume further that if these voters had been given an opportunity to vote that all may have voted for Sadlowski.*

Where no election was held or inadequate notice given, it is highly unrealistic to assume that, otherwise, every member would have voted *and* that every vote would have been for the Sadlowski slate. Yet even after crediting the Sadlowski slate with thousands of votes based upon such assumptions, and accounting for every violation found, each member of that slate still would have fallen well short, as plaintiffs concede, of winning his respective contest (without, of course, even adding in the Canadian margins). Plaintiffs must invent a new meaning for the phrase "arbitrary and capricious" if it is to apply to the Secretary's "failure" to go out and conduct an "additional investigation"—where there were no grounds to suspect the propriety of the election in any of the locals not investigated—or to credit additional Sadlowski slate contentions which the Secretary had already concluded were without merit, simply because the United States margin in the closest race had been reduced (but not eliminated) by his other findings.

(iii) Similar to the "example" just discussed is plaintiffs' assertion that it was arbitrary and capricious for the Secretary not to "extrapolate" the "rate of violation" found in the locals which were investigated "to the totality of United States locals." Pet. at 17. The Secretary was at pains to explain that his investigation was not of some random collection of locals; rather, the Secretary investigated every local where there was any reason to suspect a violation. His investigation was thus complete as it stood. To extrapolate from the findings in suspect locals to those where there was no indication of any impropriety, as plaintiffs suggest, would be irrational. What the Secretary did, on the other hand, was perfectly reasonable. His Statement speaks for itself (JA 154 233-231; emphasis added):

The 301 United States locals named in the protest and

the complaint to the Secretary were investigated. In addition an investigation was conducted of the 153 local unions which filed no election returns and an additional 225 local unions were selected for investigation. *The selection of local unions for investigation was primarily based on factors which indicated some reason for suspicion, e.g.,* lopsided results, or information gathered in the technical assistance process. As a result of leads received during the course of the investigation, 33 more local unions were investigated, including all of the local unions in Puerto Rico because in its early stages the investigation indicated a high incidence of violations there.

* * * *

The investigation in the United States did not disclose widespread fraud or other irregularities as alleged, *nor were the findings such as to indicate a pattern of violations which could be extrapolated beyond the area of investigation.* On the whole, the election was conducted in accordance with the law and with the Union's Constitution.

* * * *

These figures demonstrate to the satisfaction of the Department that the violations which occurred could not have affected the outcome of the election within the United States. *The investigation did not extend to every local union, but was planned so as to focus on those areas in which there was any indicated possibility of violations being disclosed.* The investigation extended to every District and Subdistrict Office, and included a thorough review of records and interviews of personnel at the national level. At the local level, the investigation began with the locals enumerated in the complaint and all locals in which the election results appeared in any way questionable. It was expanded to include all locals for which leads were developed and, when prelimiary investigation in Puerto Rico appeared to indicate a pattern of violation, every local on that island was investigated. *Accordingly, even if there were any violations in locals which were not investigated, the investigation was so thorough and was directed in such a manner that there is no reasonable cause to believe that any such violations were significant in magnitude or in effect.*

(iv) Plaintiffs' next "example" is that the Secretary was arbitrary and capricious in applying different measures of "potential effect" on outcome to two distinct categories of probable violations.

In the first category are all probable violations which may have had a direct impact on whether or how affected union members voted—*e.g.*, the failure of a local to hold an election, or to give adequate notice, or any violation that "tended to influence voters in favor of one candidate." JA 155. As to this category the maximum number of votes that theoretically could have been affected were credited to the Sadlowski slate. See, *e.g.*, *supra* at 23-24.

The second category comprised probable violations, neutral and technical in nature, as to which it was wholly speculative whether any votes were actually affected—*e.g.*, "lack of secrecy" (for example, balloting tables too close to each other) or "inadequate safeguards." Where there was no evidence that such probable violations "tended to influence the voters in favor of one candidate," all votes theoretically affected by violations in this category were considered "void" by the Secretary. For example in Local 1245, District 8, the Secretary found that "[t]he partitions were so low that voters looked over them to see how other members were voting." JA 203. The results from that local showed 301 votes for McBride and 177 for Sadlowski. The Secretary accounted for this secrecy violation by voiding all of of these votes—thus reducing the McBride margin by 124 votes—even though there was no evidence that a single vote would have been changed had the partitions been higher. Plaintiffs assert that in so doing, in this and similar instances, the Secretary was arbitrary and capricious. Apparently, in plaintiffs view the only rational approach to the problem in Local 1245, and others like it, is to treat the probable violation there the same as probable violations favoring one candidate; in Local 1245, then, plaintiffs' "rationality" would dictate counting all 301 McBride votes

as Sadlowski votes—in plaintiffs' view, evidently, had the partitions been higher all 301 McBride voters would have voted for Sadlowski—leaving the totals for that local as Sadlowski 478, McBride 0. At best plaintiffs offer a challenge to the Secretary's judgment, not his rationality; and, even as a matter of judgment, the Secretary—whose job it is to make such judgments—has far the better of it.

It is true that in *Bachowski* v. *Brennan*, 413 F.Supp. 147 (W.D. Pa.), *appeal dismissed on procedural grounds*, 545 F.2d 363 (3d Cir. 1976), a district judge appears to have adopted arguments similar to those made here by plaintiffs. We submit one commentator's description of that opinion:

> This decision, resting on narrow and questionable legal grounds is exceptional.[55]

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[55] In so [ruling], the court may have evinced some restiveness with the Supreme Court's decision by applying the "arbitrary and capricious" standard in a somewhat unorthodox manner. In calculating the effect that violations may have had on the outcome of the election, the Secretary distinguished between "cases where the number of votes affected can be ascertained with some certainty, and cases where it cannot." *Bachowski* v. *Brennan*, 413 F. Supp. 147, 149 (W.D. Pa.), *appeal dismissed*, 545 F.2d 363 (3d Cir. 1976). The Secretary explained that with violations of the latter type, "it is imposible to prove one way or the other if any voters were actually intimidated by such violations." *Id.* The Secretary reasonably concluded that it would be illogical to say that these violations may have affected the outcome of the election with the same probability as the violations "when the impact on such votes was directly affected by a violation and the number of such votes could be measured with some certainty." *Id.* Moreover, the Secretary noted that "substantive violations of a type which may *affect how a voter votes* are to be distinguished from merely technical violations of a procedural character." *Id.* at 150 ((emphasis in original). However, the court rejected the Secretary's distinction in this case and re manded to the Secretary to recalculate the effect that

the violations may have had on the outcome of the election. *Id.* at 151. Despite the Secretary's reasonable explanation of his method of computation, the court substituted its own judgment for that of the Secretary, seemingly contrary to the Supreme Court's admonition *Bachowski,* 421 U.S. at 575.

Note, *Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform,* 86 Yale L.J. 885, 899-900, and note 55 (1977).

The courts below properly rejected the analysis offered by the district court in *Bachowski.* See Pet. App. 14a-15a.

(v) Plaintiffs' next "example" rests upon a mischaracterization of the Statement's findings. According to plaintiffs, the Secretary found "that USWA's willful obstruction to the recruitment of Sadlowski observers could not have affected the outcome of the election. . . ." because "the denial of observers is immaterial 'if the investigation disclosed that the election was otherwise properly conducted.' " Pet. at 18. The major defect in this assertion is that the Secretary did not find any denial of Sadlowski's right to have observers, much less a "willful obstruction to the recruitment of Sadlowski observers."

As described in the Statement, JA 185, plaintiff Sadlowski's complaint to the Secretary did not allege that his observers had been turned away from any polling place but rather that certain locals did not supply him with adequate information as to the time and place of polling. But the Secretary did not find that even the latter had occurred. "In fact," in the words of the Statement of Reasons, "complainant [Sadlowski] admits that he eventually received information from virtually all the locals." *Id.* It is true that there were a large number of locals where Sadlowski did not have observers. But the Secretary found that the reasons for that absence of Sadlowski observers were in no part the fault of the union (*id.*):

> It was learned that Sadlowski had observers at only 800 locals out of the 5,400 holding elections. In Texas the decision was made, according to the head of the Sadlowski observer team in District 37, to have observers only at locals with 1,000 or more voters. In other locals no Sadlowski observers were present although the locals returned the inquiry card sent by Sadlowski. An analysis of the election returns indicates that Sadlowski generally placed observers at those locals where he had some support. . . . Sadlowski's failure to have an observer at each local was not because the locals did not respond to his inquiry. In fact, complainant admits that he eventually received information from virtually all the locals.

The decision of a candidate not to place an observer at a local—whether because of lack of support at the local or otherwise—does not render the union conducting the election in violation of the labor election laws. Plaintiffs' notion that the Secretary was arbitrary and capricious because he did not investigate the conduct of the election in each local where Sadlowski did not place an observer is at best a non-sequitur.

(vi) Plaintiffs' sixth "example" is a complete distortion of the findings of the Secretary which are set forth in the Statement, JA 185-188, and which speak for themselves.

(vii) Plaintiffs' seventh "example" is again a complete distortion of the findings of the Secretary which are set forth in the Statement of Reasons. JA 157-160. Those pages of the Statement speak for themselves; we only note here two critical points, which plaintiffs omit to mention. First, the Statement emphasized (JA 157):

> that staff representatives are union members and have the same right as all other union members to support the candidates of their choice. This is recognized in the Department's published interpretative Regulations, ...

Second, far from "read[ing] staff violations out of LMRDA" (Pet. at 20), the Secretary found a number of

"instances of improper staff campaigning at the local level," and he made deductions from McBride's total to account for the "potential effect" of each of those instances. JA 159-160.

(viii) Plaintiffs' final attack upon the Secretary's analysis is that the Secretary did not, in assessing possible effect on outcome, proceed from the starting point that the burden was on the union to prove that the violations found did not affect the outcome. This attack is without merit for two reasons:

First, while it is true that once the Secretary sues and satisfies a court that violations occurred the union has the burden of proving that such violations did not affect the outcome, *Wirtz* v. *Hotel Employees,* 391 U.S. 492, 506 (1968), it does not follow that the Secretary, in determining *whether* to sue, must assess the impact of violations in terms of the union's burden of proof. On the contrary, this Court has declared that:

> The Secretary *may not initiate an action* until his own investigation confirms that a violation of § 401 *probably infected* the challenged election.

Wirtz v. *Bottle Blowers Assn.,* 389 U.S. 463, 472 (1968) (emphasis added). This approach was reaffirmed in *Bachowski, supra,* 421 U.S. at 570. As the Court recognized in *Bachowski,* the Secretary retains a "degree of discretion to select cases" for litigation, *id.* at 572 (quoting *DeVito* v. *Shultz,* 72 LRRM 2682, 2683 (D. D.C. 1969) (Gesell, J.)), and it is surely within his discretion to abstain from suit when *he* does not believe that the violations may have affected the outcome.

Second, plaintiffs' argument that the Secretary's analysis must take into account that the union will have the burden of proof in court would not in any event avail them in this case, for that is effectively what the Secretary did here. The violations found here were isolated, and confined in their impact. Wherever the Secretary found such an isolated violation, he assumed that it had impacted upon the entire area of its potential effect. Thus, where a violation was found in a single local (as most were), the Secretary invariably treated all the votes in that local as in jeopardy, proceeding *sub silentio* on the assumption that the union would be unable to prove that the impact was more limited (or non-existent). See, e.g. *supra,* at 22-23, 26. In this respect, the Secretary proceeded exactly as the Court did in *Hotel Employees,* where the election was within a single local union. Similarly, in those rare instances where a violation involved more than one local, the Secretary treated all the votes of all affected locals as in jeopardy (see, *e.g.* JA 179-180). Surely the Secretary was not irrational in failing to project the impact of isolated violations within certain locals over those portions of the electorate outside those locals that could not conceivably have been affected by them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 79-1540

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IN THE

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v.

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and

UNITED STEELWORKERS OF AMERICA,
Intervenor-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Respondents' oppositions are a studied exercise in avoidance both of petitioners' facts and of their arguments.

1. The Secretary's Flawed "Statement of Reasons"

The petition shows that the Secretary's Statement of Reasons for refusing to bring suit to upset the election was arbitrary and capricious on its face, but the Govern-

ment responds with a mere conclusory denial (Opp. at 7), and nowhere answers petitioners' major point—that the District Court failed even to mention seven of plaintiffs' eight examples of arbitrariness and simply copied the Government's answer to the eighth:

(i) There is no answer to our showing that even thought violations in 16% of the locals in the United States reduced the McBride margin over Sadlowski by roughly 40% and Montgomery's by over 90%, the Statement of Reasons never explained why the Secretary made no further investigation in the United States during the three-month waiting period for the results of the Canadian "investigation."

(ii) There still remains only deliberate ambiguity on a controlling aspect of the election and the Secretary's decision not to sue: Did the Secretary rely on the Tremblay report in Canada or did he not? See *infra*, pp. 5-6.

(iii) To petitioners' charge that the Secretary should have analyzed the case in terms of the Montgomery contest (where even the Department's inadequate investigation eliminated over 90% of the margin), the Government has no answer, either here or in the Secretary's Statement of Reasons.

(iv) Petitioners' contention that it was arbitrary and capricious to treat denials of the right to vote in secret differently from denials of the right to vote at all is met only with the Government's concession (Opp. at 6, n. 5) that "the decision below . . . departs from the district court's analysis in *Bachowski* v. *Brennan*, 413 F. Supp. 147 (W.D. Pa.), appeal dismissed, 545 F.2d 363 (3d Cir. 1976)."

(v) Petitioners cite as a classic Catch 22 situation the Secretary's reasoning that the denial of Sadlowski observers is immaterial "if the investigation disclosed that the election was otherwise properly conducted" (Pet. at 18). The Government does not answer.

(vi) Petitioners contend that it was inconsistent for the Secretary, on the one hand, to find a "concerted effort to try to intimidate and abuse those who supported Sadlowski" which was widely publicized and, on the other hand, to find that this could not have any effect on the outcome of the election (Pet. at 19). Again no answer by the Government is forthcoming.

(vii) To petitioners' contention concerning extensive illegal USWA staff activity on behalf of the McBride slate, the Statement of Reasons argues that "distinctions between union time and personal time are difficult to make," that "Staff Representatives for the most part have no set hours" and therefore the Secretary cannot find that the staff campaigning "may have affected the outcome" of the election. The Government makes no response to petitioners' showing (Pet. at 20) that this in effect reads the statutory prohibition against illegal staff activity out of the statute.

(viii) Petitioners contend that once substantial violations were found by the Secretary, the burden of proof should have shifted to the union to demonstrate the violations did not affect the outcome of the election (Pet. at 20-21). The Government replies that this is only true once suit is brought (Opp. at 6-7, n. 6), but gives no reason for such a distinction.[1]

(ix) As to the relationship between the Labor Department and USWA lawyers, which further colors Department inaction in a case involving the leadership of a major national union, the Government does not deny that Solicitor of Labor Clauss (whose name appears on the Government brief in opposition) did exactly what the petition accuses her of doing. She reversed the Department's pre-

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[1] *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 472 (1968) merely emphasizes the desirability of unions' resolving election complaints internally.

viously neutral position on the right of an intervenor in a successful suit to upset a union election to obtain attorneys' fees from the Union and at the request of USWA counsel wrote him a letter (unbeknownst to the Solicitor General) supporting the Union's petition for certiorari in this Court opposing attorneys' fees. That letter, after editing by USWA counsel, was filed by him with this Court. This process began before the Secretary's decision in this case, and took place while USWA counsel was an active member of the screening committee considering Solicitor Clauss' nomination for a federal judgeship. After Bar Association representatives informed the Attorney General of these facts, Clauss withdrew from consideration for appointment. USWA says only (Opp. at 4) that "with respect to the incident in question . . . no impropriety occurred," without deigning to explain, deny, or justify the actions taken.

(x) Neither respondent answers petitioners' background material regarding incumbent self-perpetuation and stolen elections in USWA. The Government says nothing, and USWA itself, although contending that the Official Family is "mythical" (Opp. at 4), nowhere challenges that the words and description are those of USWA President Abel, who detailed how the Official Family ran the union and how members should not go outside the Union for any purpose, even to correct fraud (Pet. at 4). The Official Family cannot, of course, deny its most recent action to perpetuate itself, through rules denying reformers outside assistance while permitting union staff to provide full financial and other support for the incumbents to whom they are beholden (Pet. at 5).

2. The Secretary's Failure to Investigate

Petitioners contend (Pet. at 11-13) that the Secretary failed to make a full, reasonable and proper investigation of the election either in Canada or the United

States. The Government's opposition illuminates rather than answers this failure.

Thus, in the petition we state that "It is impossible to determine even today what the Secretary's position is on this Canadian investigation" (at 11). As we pointed out in the petition (at 11-12), "The Statement of Reasons uses studied ambiguity—'Nothing in Mr. Tremblay's Report affects those conclusions' (J.A. 145)—which can mean either he did or he did not rely on the Tremblay investigation. Then the Department changed its position; a month later, on December 12, 1977, the Solicitor of Labor wrote plaintiffs' attorneys that '. . . it must be clear to you that we did not rely on the Canadian report in reaching the decision to close the case' (J.A. 30). In the District Court the Department of Labor returned to its studied ambiguity, threw doubt on its December 12, 1977 letter and appeared to be placing some unspecified degree of reliance on that investigation. In the Court [of Appeals] . . . the Government compounded the ambiguity of its earlier positions . . . with the new, meaningless and self-evident proposition that 'the report of the Canadian Government . . . did not affect the conclusions of the Department of Labor with respect to the United States portion of the investigation' (Brief 7, 37)." Finally, in this Court the Government simply seeks to evade the issue of the Canadian non-investigation by twice alleging (Opp. at 4, 7) that the Secretary "had no control" over its conduct,[2] and asserting the dif-

[2] This is disingenuous. Clearly, the Secretary, upon being informed of Tremblay's conflict of interest (J.A. 28), could have asked the Canadian Government for a new investigator instead of rejecting abruptly plaintiffs' information concerning Tremblay's conflict. Equally, if the Government were unable to obtain Canadian cooperation, the Secretary could have adopted petitioners' and one of his own investigators'

ferent (but equally meaningless) proposition that it "had not uncovered any evidence affecting the validity of his conclusions."

Yet, both the Government and USWA concede that Tremblay, who conducted the "investigation," is paid by USWA to arbitrate labor disputes (Gov't Brief in Court of Appeals at 26; USWA Opp. at 20-21, n. 11).[3] Nor do respondents deny any of petitioners' specific illustrations of the inadequacy and unfairness of Tremblay's proceedings. Neither respondent makes even a *pro forma* claim that the Canadian proceedings and report were adequate, fair or reliable.

If the Secretary relied on this Canadian "investigation," his decision was predicated on an unlawful investigation by a man in the pay of the Steelworkers and carried out under the dubious conditions described in our petition (at 11). If he did not so rely, then the Secretary made no investigation whatever of a substantial part of the election and his action is equally unlawful. The Government, in its opposition, simply attempts to evade this dilemma by refusing any clear factual evidence nor does it answer the legal defects of the Secretary's position.

LMRDA provides that "the Secretary *shall* investigate" union members' complaints. The Government fails to answer petitioners' contention that this mandatory duty was not properly fulfilled. Instead, it says in effect (Opp. at 7) that if the Secretary says he investigated, the members from whom an election has been stolen, and the reviewing courts, are bound by his *ipse dixit*. The

suggestion that plaintiffs' witnesses be brought to this country to give evidence which the union would then have been forced to rebut, see Pet. at 12-13, n. 9.

[3] The potential for gaining USWA goodwill here without disaffection of other parties in the labor disputes Tremblay arbitrates makes his conflict of interest obvious.

cited authority for this result is *Bachowski*, despite the fact that in that case the adequacy of the Secretary's investigation was never in question. Here, contrary to the *Bachowski* situation, the issue is whether the Secretary performed his mandated duty to make a full, reasonable and proper investigation, and whether petitioners may be denied judicial relief against the Secretary's failure to perform this mandated duty.

3. Frustration of the Statutory Intent

Bachowski established the principle that the judgment of the Secretary of Labor not to sue to redress violations of Title IV of LMRDA is subject to judicial relief. In defining the conditions of such relief, *Bachowski* assumed that in exercising his judgment the Secretary had made an investigation adequate for informed judgment. But given the deficient investigation here, the Secretary lacked the facts necessary for making an *informed* judgment. *Bachowski* assumed, moreover, that the Secretary was acting in his "role as lawyer for the complaining union member."[4] Yet here the Secretary has not only failed to carry out his duty as lawyer but denied the existence of such a duty and treated Sadlowski representatives with hostility, while simultaneously cooperating with USWA's Official Family. The Government does not deny this, but instead seeks to justify this treatment by citing the Secretary's "broad discretion" and by saying that his only "duty [is] to be impartial during the investigatory stage" (Opp. at 7). The Government cites no apposite authority for this result.[5] And

[4] This duty is the predicate for *Bachowski*'s requirement that the Secretary provide the complaining member with the reasons for a decision not to sue. 421 U.S. at 572.

[5] *Calhoon* v. *Harvey*, 379 U.S. 134 (1964) deals with the permissibility of pre-election lawsuits brought by individual

it ignores the legislative history establishing the duty—the statement of LMRDA's sponsor, Senator John Kennedy, that upon appeal to the Secretary "*Then* the Secretrary of Labor in effect becomes the union member's lawyer" (emphasis added) (Legis. Hist. of the LMRDA 1093).

Under these circumstances it is less than no answer to suggest, as USWA does (Opp. at 18), that petitioners should have sought a writ of mandamus against the Secretary during the investigation to improve its scope and reliability. Such an action, however, would have required knowledge of the full scope of the inadequacy of the Secretary's investigation at a time when the Secretary refused even to keep petitioners apprised of its progress. Moreover, it would have required the courts to entertain premature and unnecessary litigation. Union members who are deprived by the statute of their own right to sue to upset an unfair union election are entitled to real, not illusory remedies.

The net effect of the objections urged by respondents before this Court is that a default by the Secretary of Labor on his statutory duties leaves union members with no remedy for elections flawed by illegal misconduct. But when Congress enacted LMRDA, it was concerned that union officials would abuse their power, and "saw the principle of union democracy as one of the most important safeguards against such abuse, and accordingly included in the LMRDA a comprehensive scheme for the

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members, and *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477 (1968) holds that the Secretary's role in protecting the public interest is so vital that he cannot be limited to the allegations of the member's complaint but should have broad authority to investigate and bring actions to overturn elections. The Government's use of this decision as authority for treating complaining members with hostility and refusing to consider all their evidence is a sad commentary on its view of its LMRDA enforcement responsibilities.

regulation of union elections." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 531 (1972). It is "Title IV's special function in furthering the general goals of the LMRDA . . . to insure free and democratic union elections, the regulations of the union electoral process enacted in the Title having been regarded as necessary protections of the public interest as well as of the rights and interests of union members." *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 483 (1968).[6]

Contrary to the Congressional intent, the Secretary has defaulted on his duty to make a proper investigation, has failed to carry out his role as lawyer for the complaining union members, and has failed to give adequate reasons for refusing to sue. This Court's rulings in *Trbovich* and *Bachowski* established that the Secretary does not enjoy unlimited discretion in the enforcement of Title IV, but is subject to judicial correction. In refusing relief here, the lower courts permit the Labor

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[6] This Court has many times recognized the importance ascribed by Congress to union democracy and the vital role of vigorous LMRDA enforcement for dissident union members and for the public interest. E.g., *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 482-83 (1968); *Wirtz* v. *Glass Bottle Blowers Ass'n*, 389 U.S. 463, 474 (1968) (referring to "the abuses surfaced by the extensive Congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions"); *Dunlop* v. *Bachowski*, 421 U.S. 560, 570-72 (1975) (" 'surely Congress must have intended that courts would intercede sufficiency to determine that the provisions of Title IV have been carried out in harmony with the implementation of other provisions of [the LMRDA]' "); *Wirtz* v. *Hotel, Motel & Club Employees Union*, 391 U.S. 492, 505-07 (1968) (noting that Congress had deliberately lightened the burden of demonstrating the effect of Title IV violations).

Department to frustrate the clear Congressional intent "to insure free and democratic union elections."

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